SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 91

JOHN WILEY & SONS, INC., PETITIONER,

vs.

DAVID LIVINGSTON, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., JULY 16, 1963

[fol. A] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

27629

In the Matter of DAVID LIVINGSTON, as President of District 65, Retail, Wholesale and Department Store Union, AFL-CIO, Plaintiff-Appellant,

against

JOHN WILEY & SONS, INC., Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Appendix to Brief for Plaintiff-Appellant—Filed August 27, 1962

Weisman, Allan, Spett & Sheinberg, Attorneys for Plaintiff-Appellant, 1501 Broadway, New York 36, N. Y.

Irving Rozen, of Counsel.

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In the Matter of DAVID LIVINGSTON, as President of District 65, Retail, Wholesale & Department Store Union, AFL-CIO, Plaintiff,

v.

JOHN WILEY & SONS, INC., Defendant.

DOCKET ENTRIES

1962

Jan. 23—Summons and Complaint served and filed.

Jan. 25—Order to Show Cause why arbitration should not be compelled, returnable Jan. 30—served.

Mar. 6—Hearing had before Judge Sugarman on motion to compel arbitration.

Mar. 30—Order—petitioner's motion to compel arbitration denied.

Apr. 18—Notice of Appeal from Order served by mail.

Apr. 19—Notice of Appeal filed with Clerk of the Southern District of New York with bond.

June 28—Docketed and filed record on appeal.

[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

SUMMONS—January 23, 1962

To the above named Defendant:

You are hereby summoned and required to serve upon Weisman, Allan, Spett & Sheinberg, plaintiff's attorneys, whose address is 1501 Broadway, New York 36, New York, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Herbert A. Charlson, Clerk of the Court.
Elsie M. Eiler, Deputy Clerk.

[fol. 3]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

COMPLAINT—Filed January 23, 1962

Plaintiff, by its attorneys, Weisman, Allan, Spett & Sheinberg, complaining of the defendant, alleges:

1. This Court has jurisdiction of this cause of action under Section 301 of the Labor-Management Relations Act, Title 9, United States Code Annotated 29 U. S. C. Sec. 185 and the United States Arbitration Act, Title 9, U. S. C.

2. Plaintiff, hereinafter called the "Union" is an unincorporated association, a labor organization located at 13 Astor Place, in the Borough of Manhattan, City, County and State of New York, with a membership of upwards of 30,000 individuals in the metropolitan area of the City of New York, and in collective bargaining relationship with upwards of 2,000 employers in the said metropolitan area.

3. Defendant, hereinafter called the "Company" is a New York corporation, with its principal place of business in the Borough of Manhattan, City, County and State of New York, and is engaged in the publishing, selling and distribution of books and other publications in interstate commerce. Defendant does a business in interstate commerce annually in a sum upwards of nine millions of dollars.

4. Interscience Publishers, Inc., hereinafter called "Interscience" was a New York corporation with offices in the Borough of Manhattan, City, County and State of New York, [fol. 4] and was likewise engaged in the publishing, sale and distribution of books and other publications in interstate commerce in excess of a million dollars annually.

5. The Union has been for many years in collective bargaining relationship with Interscience, and the current contract presently in force, is dated February 3, 1958. A copy of this contract is attached hereto, marked Exhibit "A". Supplementary letters modifying said contract dated respectively April 8, 1960 and March 6, 1961, between the Union and Interscience, are attached hereto and marked Exhibits "B" and "C".

6. On or about October 2, 1961, Interscience consolidated with the Company, defendant in this action, under the Stock Corporation Law of the State of New York.

7. Section 90 of the Stock Corporation Law of the State of New York provides:

> "*Rights of Creditors of Consolidated Corporations,*
>
> The rights of creditors of any constituent corporation shall not in any manner be impaired, nor shall any liability or obligation due or to become due, or any claim or demand for any cause existing against any such corporation or against any stockholders thereof be released or impaired by any such consolidation; but such consolidated corporation shall be deemed to have assumed and shall be liable for all liabilities and obligations of each of the corporations consolidated in the same manner as if such consolidated corporation had itself incurred such liabilities or obligations. The

stockholders of the respective constituent corporations shall continue subject to all the liabilities, claims and demands existing against them as such, at or before the consolidation; and no action or proceeding then pending before any court or tribunal in which any [fol. 5] constituent corporation is a party, or in which any such stockholder is a party, shall abate or be discontinued by reason of such consolidation, but may be prosecuted to final judgment, as though no consolidation had been entered into; or such consolidated in the same manner as if such consoli- [sic] in place of any constituent corporation, by order of the court in which such action or proceeding may be pending • • • "

Notwithstanding the foregoing, the Company, since said consolidation on or about October 2, 1961, has failed and refused to recognize the validity of said collective bargaining agreement (Exhibits "A", "B", and "C", hereinabove referred to), currently and beyond January 30, 1962, and has failed and refused to recognize the property rights of the former Interscience employees thereunder, and otherwise beyond January 30, 1962, in that among other things:

(A) It has failed to recognize and continue the seniority rights of said employees vested in them during their employment by Interscience;

(B) It has failed and refused to make proper reports and payments to the District 65 Security Plan and the District 65 Security Plan Pension Fund as provided in Article XV of said collective bargaining agreement;

(C) It has failed to recognize the job security rights of said employees including the grievance machinery and arbitration procedures set forth in said collective bargaining agreement;

(D) It has failed to obligate itself to continue liable for severance pay as provided in Article XXIII of said collective bargaining agreement;

[fol. 6] (E) It has failed to obligate itself to continue the vested vacation rights to Interscience employees as

specified in the current collective bargaining agreement.

8. Interscience employed some forty employees and the Company presently employs said employees. Attached hereto as Exhibit "D" is a schedule showing their names, the dates when their employment commenced, duration of service, and salaries and ages.

As said Exhibit "D" reveals, the employees have built up many years of seniority, running as high as eleven and a third years, and unless these seniority rights are protected in accordance with said collective bargaining agreement or otherwise, said employees will be seriously affected and prejudiced. The salaries of the said employees are fairly substantial, running as high as $124.45 per week, and it would be extremely difficult, if not impossible, for many of these employees to obtain similar jobs at similar salaries if they were to be discharged by the Company at some future date. Further, even if such discharged employees were to receive similar salaries elsewhere, they would be compelled to start without any seniority, to their serious damage and prejudice.

9. Under said collective bargaining agreement, Interscience is obligated to keep on deposit with the said Plan and Fund, against future contributions by it, the sum of $4,000, but in violation of said obligation, on or about October 1, 1961, it furnished the said Plan and Fund with a report for the third quarter of 1961, showing the sum of $4,184.06 due from it to the said Plan and Fund, and instead of making payment of said last named amount, it remitted the sum of only $684.06, thus improperly crediting to its account its then deposit of $3,500.

Interscience's contributions to the said Plan and Fund in the past have averaged about $4,000 a quarter, and there [fol. 7] will be due and payable, on or about January 30, 1962 for the last quarter of 1961, an additional contribution by it in the sum of approximately $4,000, but the Company has stated that it will not make such payment.

Said "65 Security Plan" and "65 Security Plan Pension Fund" are organized and maintained out of contributions

made by employees in collective bargaining relationship with the Union for the health, welfare and pension benefits to members of District 65, as employees of their respective employers.

The Company should increase the deposit by $500; so that there is now or shortly due the sum of $3,500, (wrongly credited by the Company on October 1, 1961), the sum of $4,000 (due January 30, 1962) and the sum of $500 (additional deposit above mentioned)—a total of $8,000. The Company refuses to obligate itself to make any such payments in the future.

10. The Company has failed and refused to recognize said collective bargaining agreement and the supplementary letters modifying said contract (Exhibits "A", "B", and "C", hereinabove referred to) in that it has refused to comply with the grievance machinery and arbitration procedures set forth in said collective bargaining agreement. The job security, the grievance machinery, and the arbitration provisions of said collective bargaining agreement are among the most important provisions of said contract, affecting as they do job security and conditions of employment of the Company's employees, and the failure of the Company to recognize and comply with said provisions directly affect the tenure, seniority and job security of said employees.

11. Article XVI of the said collective bargaining agreement provides in part, as follows:

[fol. 8] "*Sec. 16.0.* Any differences, grievances or dispute between the Employer and the Union arising out of or relating to this agreement, or its interpretation or application, or enforcement, shall be subject to the following procedures, which shall be resorted to as the sole means of obtaining adjustment of the difference, grievance, or dispute, hereinafter referred to as 'grievance': * * * "

12. Article XXIII of the said collective bargaining agreement provides in part:

"*Sec. 23.0.* Employees (1) discharged for cause, as limited below, and not thereafter rehired or reinstated,

or (2) who are laid off by the employer for an indefinite period of time, or for a specific period of more than thirty (30) days, and who have rendered at least six (6) months continuous service with the employer, shall receive severance pay, as follows:

Over six (6) months and under one year of continuous service	1 week
Over one (1) year and under two years of continuous service	2 weeks
Over two (2) years and under four years of continuous service	3 weeks
Over four (4) years and under seven years of continuous service	4 weeks
Over seven (7) years and under ten years of continuous service	5 weeks
Over ten (10) years of continuous service	6 weeks

Severance pay shall be computed on the basis of the employee's regular weekly rate of pay in effect at the time of such layoff.

[fol. 9] The Company is, however, in violation of the aforesaid rights of the employees in that it has refused to obligate itself in any manner with respect to severance pay obligations under said contract and has refused to reassure the said employees that their severance pay will be paid to them at any time in the future should the occasion therefor arise. Since, as shown in Schedule "D" attached hereto, the employees have to their credit many years of seniority, the rights of severance pay have been built up over a good many years. For the Company now to seek to cancel its obligations is a clear violation of the vested property rights of said employees.

13. Article XII of the current collective bargaining agreement provides in part, with respect to vacations:

"*Sec. 12.0.* All regular employees shall be entitled to the following vacations with pay, which shall be based upon length of service, as follows:

(a) One (1) day vacation for each continuous month of service, as of July 1st of each year, up to a total of ten (10) consecutive days.

(b) Three (3) weeks consecutive vacation for continuous service of five (5) years or more.

(c) Four (4) weeks consecutive vacation for continuous service of twenty (20) years or more."

Vacation pay is deferred wages and since the employees have built up their rights to vacation pay based upon length of service, it is wrongful on the part of defendant Company to refuse to commit itself to make payment of the vacation [fol. 10] pay which has been earned by the employee during their years of service.

14. The collective bargaining agreement contains among other things, a Basic Crew Clause which provides for the retention of twenty-six (26) "jobs", (set forth more particularly in Exhibit "B" attached hereto)

" • • • The Company will not reduce by lay-off, the number of jobs in the collective bargaining unit to less than twenty-six (26) • • • "

(Exhibit B—Letter of April 8, 1960)

In violation of said obligation, the Company has terminated the "jobs" of all the former Interscience employees and failed and refused to continue said "jobs" and to obligate itself to continuance of same, with all the benefits and rights appertaining thereto.

15. Interscience commenced making its contributions to the District 65 Security Plan Pension Fund July 1, 1959, since which date the employees have built up vested property rights in the 65 Pension Plan. While the Company has informally advised the Union that its own pension system will be made applicable to the employees, the Company refused to contractually obligate itself so to do, and has advised the Union that any action on its part insofar as pension (or job security) is concerned, is purely voluntary and

gratuitous. In any event, the Pension benefits under the Company's plan are inferior to those under the 65 Pension Plan.

16. By reason of the Company's defaults, as herein set forth, the former Interscience employees are presently being compelled to make direct payments, out of their own funds, into the 65 Security Plan in order to continue their [fol. 11] health and welfare benefits; and they will have to do likewise with respect to Pension Fund benefits.

17. After the said consolidation, the job conditions of the former Interscience employees were changed and made more burdensome and said employees are, by reason of the Company's defaults, left remediless and without power to adjust their grievances.

18. Notwithstanding the broad language of the arbitration clause, Article XVI of Exhibit "A" (in part referred to in paragraph 11 *supra*), Interscience and the Company have failed and refused to comply with said contract and said grievance machinery and arbitration clause, and have failed and refused to arbitrate the issues herein referred to, namely:

(a) Whether the seniority rights built up by the Interscience employees must be accorded to said employees now and after January 30, 1962.

(b) Whether, as part of the wage structure of the employees, the Company is under an obligation to continue to make contributions to District 65 Security Plan and District 65 Security Plan Pension Fund now and after January 30, 1962.

(c) Whether the job security and grievance provisions of the contract between the parties shall continue in full force and effect.

(d) Whether the Company must obligate itself to continue liable now and after January 30, 1962 as to severance pay under the contract.

(e) Whether the Company must obligate itself to continue liable now and after January 30, 1962 for vacation pay under the contract.

[fol. 12] Wherefore, plaintiff demands judgment directing that the defendant be compelled to submit to arbitration on the question herein referred to, and directing said defendant to proceed with said arbitration to final award, together with costs and disbursements of this action.

Weisman, Allan, Spett & Sheinberg, By Irving Rozen, A Member of the Firm, Attorneys for Plaintiff, Office & P. O. Address, 1501 Broadway, New York 36, New York.

[fol. 13]

EXHIBIT A TO COMPLAINT

CONTRACT—INTERSCIENCE PUBLISHERS, INC.

with

DISTRICT 65

Substitute for Pages 1 & 2 of Mimeographed Agreement dated February 3rd, 1950.

AGREEMENT made as of this 1st day of February, 1960, by and between INTERSCIENCE PUBLISHERS, INC. and the INTERSCIENCE ENCYCLOPEDIA, INC., of 250 Fifth Avenue, New York City (hereinafter called the "Employer") and DISTRICT 65, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION-AFL-CIO, of 13 Astor Place, New York City (hereinafter called the "Union") for and on behalf of itself, its members now employed or hereafter to be employed by the Employer and collectively designated as "employees":

WITNESSETH:

In consideration of the mutual promises of the parties hereto, it is mutually agreed as follows:

ARTICLE I: RECOGNITION: BARGAINING UNIT; EXEMPTIONS.

Sec. 1.0. The Employer recognizes the Union as the exclusive bargaining agent of its clerical and shipping employees as defined in Sec. "1.1." The Employer also agrees

to recognize and deal with such representatives as the Union may elect or appoint, provided that only one (1) Shop Steward shall be designated for each of the Employer's locations. 250 Fifth Avenue, N.Y.C. shall be considered as one location.

Sec. 1.1. The bargaining unit shall consist of all clerical and shipping employees at the above location or at any [fol. 14] branch office of said location hereafter opened by the Employer in the Greater New York area. The following types and classes of persons employed by the Employer shall be excluded from the bargaining unit: Corporate officers and all executive, administrative, professional, supervisory, confidential and editorial personnel, irrespective of their titles or the duties of their positions. Corporate officers having confidential secretaries on February 1, 1960 shall be entitled to have confidential secretaries without limitation or restriction. Other corporate officers shall be entitled to confidential secretaries if a substantial part of the secretary's duties is of a confidential nature. Said excluded personnel are referred to hereinafter as persons in the Employer's "exempt" group. Whenever used in this agreement, the term "employee" shall mean and refer to only persons included within the above described bargaining unit.

Sec. 1.2. The Union agrees that, during the life of this agreement, it will not act as the representative of persons in the "exempt" group herein excluded from the bargaining unit.

Sec. 1.3. The Union shall accept into membership all employees who are included within the above defined bargaining unit, and the Union shall not discriminate in any manner against any employee otherwise eligible for membership, whether or not such employee formerly was or was not a member of the Union under previous agreements between the parties hereto.

ARTICLE II: CHECK-OFF.

Sec. 2.0. Upon written notice from the Union, the Employer will deduct all Union membership dues as provided

in the authorization form set forth below, upon condition that, at the time of such notice, the Union shall furnish the Employer with a written authorization executed by the employee in the following form:

[fol. 15] "I hereby authorize and direct my Employer, Interscience Publishers, Inc. (or Interscience Encyclopedia, Inc.) to deduct from my wages and to pay over to District 65, R.W.D.S.U., A.F.L.-C.I.O., on written notice from said Union, such amounts, including initiation fees and assessments regularly a part of membership dues (if any be owing by me) as my membership dues in said Union as may be established by the Union and become due to it from me during the effective period of this authorization. This authorization may be revoked by me as of any anniversary date hereof or upon the termination of the collective agreement covering my employment (whichever is sooner), by written notice of such revocation, signed by me, received by my Employer not more than sixty (60) days before the required date."

Sec. 2.1. The employer will notify the Union promptly of any revocation of such authorization received by it.

ARTICLE III: UNION SHOP.

Sec. 3.0. All regular employees now in the bargaining unit, as defined in Article "I" of this agreement, and new employees, on and after thirty (30) days after this provision becomes effective or on and after thirty (30) days after the date of their employment, shall become and remain members of the Union in good standing during the life of this agreement as a condition of their employment, provided that the Employer shall not be required to carry out the foregoing provision in any manner that violates the provisions of the Labor-Management Relations Act of 1947, or any amendments thereof.

ARTICLE IV: NEW EMPLOYERS; HIRING; PROBATION.

Sec. 4.0. Whenever the Employer shall require new employees, it shall first offer employment to those of its em-

[fol. 16] ployees who may have been laid off, in accordance with the seniority provisions of this agreement.

Sec. 4.1. If the Employer shall require new employees in addition to those obtained pursuant to Section "4.0" hereof, it shall notify the Union of such need and the Union undertakes to supply available persons who have the qualifications and experience for the position to be filled, in accordance with the Employer's specifications.

Sec. 4.2. If the Union fails to supply qualified employees (the Employer to be the sole judge as to the qualifications and desirability of hiring any person referred to the Employer by the Union) within three (3) working days after such request was made, the Employer may engage such new employees from any other source. The exercise or non-exercise of judgment by the Employer with respect to the hiring or non-hiring of any specific person referred to the Employer by the Union shall not be arbitrable within the meaning of this agreement.

Sec. 4.3. The employment facilities of the employment office operated by the Union shall be made available to all persons, regardless of whether they are members of the Union or not, and, in operating such employment office and making referrals to the Employer, the Union will not discriminate against, restrain, or coerce any person because of his non-membership in the Union.

Sec. 4.4. All employees within the bargaining unit, as defined herein in Article "I", shall serve a probationary period of six (6) weeks, which period may be extended by the Union on request by the Employer, before he shall be considered a permanent or regular employee. During such probationary period, his employment may be terminated without notice by the Employer for any reason whatsoever. [fol. 17] Such termination of employment may not be made the subject of a grievance under the terms of this contract.

Sec. 4.5. Within one (1) week after hiring new employees, the Employer shall furnish to the Union a list of new employees hired. Likewise, the Employer shall furnish the names of all persons hired in its "exempt" group personnel.

ARTICLE V: PART TIME EMPLOYEES.

Sec. 5.0. Part time employees shall be entitled proportionately to holiday, vacation, sick-leave and other monetary fringe-benefits herein allowed to regular full-time employees. However, the same shall be allowed in the proportion that the average daily hours of work of the part-time employee bears to the established work-week for full-time employees.

ARTICLE VI: SENIORITY.

Sec. 6.0. The Employer shall establish and maintain a seniority list of regular employees, by name and date of employment—with the name of the employee having the longest length of service to be placed at the top of said seniority list. The names of all employees with shorter length of service shall follow the name of such senior employee, in order, until the name of the employee with the shortest length of service appears at the foot of the list.

Sec. 6.1. The names of employees whose trial or probationary periods have not expired shall not be placed upon the seniority list.

Sec. 6.2. In making promotions or filling vacancies, whenever practicable, such promotions or vacancies shall be made or filled by the Company from among its regular employees on this basis: The senior employee shall have the first opportunity for the position, provided that he is [fol. 18] then qualified and able to discharge the duties and responsibilities of the new position.

Sec. 6.3. In the event that the Employer decides that a reduction in force is required, the above principle of seniority, whenever practicable, shall apply, namely, the last person hired shall be the first to be separated from employment and laid-off, provided that the remaining employees then have the qualifications and ability to perform the required work.

Sec. 6.4. In rehiring, the same principle, wherever practicable, shall apply, namely, the last person laid-off shall be the first to be rehired, consistent with the principle, stated

above, that he shall then have the ability to perform the required work.

Sec. 6.4.1. The Employer shall be the sole judge of "practicability" and the "ability" of employees to discharge the duties and responsibilities of the position. None of its decisions in respect to the same shall be arbitrable.

Sec. 6.5. Should a laid-off employee fail to report to work within five (5) working days after ordinary mail notification (with a copy to the Union) by the Employer to so report, his seniority and employee status shall be terminated. The Employer shall be entitled to rely upon the last address of the employee shown on the Employer's employment record.

Sec. 6.6. The Shop Stewards appointed by the Union shall head the seniority list during their term of office only, provided they are able and are willing to perform the work assigned to them. The provisions of this section shall have no application in the making of promotions or in the assignment of vacations.

Sec. 6.7. Any employee permanently transferred or promoted from one position to another shall be given four [fol. 19] (4) weeks' probation in the new position, and, if he proves to the satisfaction of the Employer that he is able satisfactorily to perform the job duties, he will receive the rate of pay of that job. The Employer may request the Union for an extension of such 4 week period, and such request may not be unreasonably refused by the Union. If at the end of the four (4) weeks or extended probation period, as the case may be, the employee is found to be incapable of performing the new job, the employee, in the Employer's sole discretion, shall be returned to the position from which he was transferred, without loss of seniority.

Sec. 6.8. Five (5) working days' notice shall be given to employees before a lay-off occurs, and such notice shall be given to the Shop Steward and posted on the Bulletin Board.

Sec. 6.9. Employees who are laid off shall retain their seniority and right to reemployment for a period of six (6) months.

Sec. 6.10. The Employer shall have the sole right to determine the extent to which its establishments, in whole or in part, shall be operated or shut-down or its operations reduced or increased. No shut-down or reduction of operations because of reduction in volume, lack of sales, shortage of material, or other legitimate business reason, shall be deemed a lockout within the meaning of this agreement.

Sec. 6.11. Seniority rights under this Article shall be lost for the following reasons only:

a. Voluntary quitting or resignation.

b. Discharge for just cause.

c. Failure to return to work as required in Sec. 6.5 hereof.

[fol. 20] d. After a lay-off of 6 months.

e. Absence from work for 3 or more consecutive days without giving adequate and timely written notice to the Employer and a reasonable excuse for such absence.

ARTICLE VII: DISCHARGES AND LAY-OFFS.

Sec. 7.0. The Employer retains the right to discharge or otherwise discipline employees for just cause. Except in situations involving gross misconduct (by way of example, but not in limitation thereof, such as deliberate disobedience of an order of a superior relating to company business, dishonesty, larceny, intoxication, fighting, or the commission of any crime or misdemeanor) before discharging the employee, the Employer immediately shall notify the employee, the Shop Steward and the Union of the proposed discharges. Within twenty-four (24) hours, both parties shall meet to discuss the same. Notwithstanding such meeting and irrespective of whether or not such a meeting is actually held, the Employer, at the expiration of such 24-hour period, may then discharge the affected employees.

Sec. 7.1. In the event of a disagreement between the Union and the Employer as to any discharge or other disci-

plinary action, it shall be submitted to arbitration, according to the provisions of this agreement.

Sec. 7.2. Should the Employer at any time deem it necessary to reduce the number of employees by lay-offs, reduction in staff, or discontinuance of certain lines of activity or business operations, it shall have the sole and unqualified right to take such action. The Employer agrees that all lay-offs occasioned by such action shall be in accordance with seniority, as provided for in Article "VI" of this agreement.

[fol. 21] ARTICLE VIII: HOURS OF WORK; OVERTIME PAY.

Sec. 8.0. The regular working hours under this agreement shall be 35 hours per week, 7 hours per day, 5 days per week, Monday to Friday, inclusive. Employees shall be entitled to the daily one (1) hour lunch period.

Sec. 8.1. Should any employee work more than 7 hours in any one day or more than 35 hours in any one week, he shall be paid for such overtime at the rate of time and one-half, except where such work constitutes make-up time. Work performed on Sunday shall be paid at the rate of double time. Employees working overtime who shall have worked two hours in the evening shall receive $2.50 as supper money. Employees who are required to, and actually work, all day on Saturday, shall receive $2.50 as luncheon money. If requested to work overtime, employees will be expected to do so unless he or she is excused for good cause. Employees shall not have the right to refuse reasonable requests by the Employer for overtime work. Any claim by an employee that he or she has been required to work unreasonable or excessive overtime may be made the subject of a grievance. However, nothing in this agreement shall be construed as a limitation on the Employer's part to require overtime work. The Employer may contract work out or use any other means available to it to perform the same whenever any part of the regular work force is not available or has refused to perform overtime work within the time required by the Employer.

ARTICLE IX: MINIMUM WAGES.

Sec. 9.0. Effective as of February 1, 1960, employees shall be paid no less than the minimum rates of pay for their respective job classifications, as set forth in Appendix "A", attached hereto.

[fol. 22]

ARTICLE X: WAGE INCREASE; COST OF LIVING CLAUSE.

Sec. 10.0. Effective as of February 1, 1960, all regular employees shall be paid a wage increase of $3.00 per week. Effective as of February 1, 1961, all regular employees shall be paid a wage increase of $2.00 per week.

Sec. 10.01. There shall be a single cost of living review of wages as of February 1, 1961. If on February 1, 1961, the Consumer Price Index for New York City as established by the Bureau of Labor Statistics of the United States Department of Labor reveals an increase over the index as of February 1, 1960, the effective date of this contract, i.e. 124.1, the wages of all employees shall be increased by the same percentage as the index has risen, but not more than $1.00 per worker.

The increase, if any, provided for under this paragraph shall be computed on the average wage of the employees on February 1, 1960, but none shall be paid if the increase would amount to less than $.50 per worker.

ARTICLE XI: HOLIDAYS AND HOLIDAY PAY.

Sec. 11.0. Subject to the terms of Section "11.3", the Employer agrees to pay the employees full daily salary for the following standard eight (8) holidays, as if they worked thereon:

1. New Year's Day
2. Washington's Birthday
3. Decoration Day
4. Independence Day
5. Labor Day

6. Election Day

7. Thanksgiving Day

8. Christmas Day

[fol. 23] Sec. 11.1. The following religious holidays will be observed:

1. The Jewish Day of Atonement as a holiday for all employees;

2. The first and second days of the Jewish New Year for Jewish employees;

3. Provided neither of the Jewish New Year holidays falls on a Saturday or a Sunday, non-Jewish employees shall have Good Friday and another Christian holiday to be designated. If one or both of the Jewish New Year holidays falls on a Saturday or a Sunday, non-Jewish employees shall have only Good Friday.

Sec. 11.2. All eight (8) standard holidays shall be paid for, irrespective of the day of the week on which they fall; a religious holiday falling on a Saturday or Sunday shall not entitle employees to holiday pay or to a day off on a business day.

Sec. 11.3. Temporary employees shall be entitled to holiday pay for any holidays that fall on or are observed during such temporary employment.

ARTICLE XII: VACATIONS.

Sec. 12.0. All regular employees shall be entitled to the following vacations with pay, which shall be based upon length of service, as follows:

a. One (1) day vacation for each continuous month of service, as of July 1st of each year, up to a total of ten (10) consecutive days.

b. Three (3) weeks consecutive vacation for continuous service of five (5) years or more.

[fol. 24] c. Four (4) weeks consecutive vacation for continuous service of twenty (20) years or more.

Sec. 12.1. Eligibility for vacations and vacation pay shall be determined as of July 1st of each year and all vacations shall be scheduled sometime between June 1st and September 15th, unless otherwise mutually agreed.

Sec. 12.2. Where employees leave the Employer's employ, pro-rata vacation pay shall be awarded only as follows:

a. Employees who were discharged (except for gross misconduct) or laid off, shall receive their pro-rata vacation pay.

b. Employees who voluntarily resign shall likewise receive their pro-rata vacation pay, provided they have given the Employer two (2) weeks' written notice of their intention to resign.

Sec. 12.3. Should a standard holiday occur during the vacation period of any employee, such employee shall be entitled to one (1) additional day of vacation.

Sec. 12.4. All vacations shall be taken by individual employees on consecutive days and vacations shall not be split into more than one (1) consecutive period of time, except by prior arrangement, in writing, signed by an officer of the Employer.

ARTICLE XIII: SICK LEAVE.

Sec. 13.0. All regular employees shall be entitled to sick leave with pay at the rate of twelve (12) days per contract year beginning February 1 of each year of this agreement. In those instances, where an employee has not used the full amount of his sick leave allowance of twelve (12) days for the period beginning February 1, 1959, and ending January [fol. 25] 31, 1960, and, where such employee has an unused balance of six (6) or more days of sick leave for that period, such unused balance of sick leave (to the extent of only six (6) days) shall be added to the regular sick leave allowance

of twelve (12) days for the contract year beginning February 1, 1960. In like manner, such unused balances of sick leave to the extent of only six (6) days shall be added, where required, to the regular sick leave allowance for the contract year beginning February. 1, 1961. In no instance shall such an employee be entitled to more than eighteen (18) days of sick leave with pay during any contract year. In case of an extended illness, the Employer shall grant a sick employee a leave of absence, without pay, not in excess of three (3) months, providing that reasonable written proof of such extended illness is submitted to the Employer. If such extended illness continues beyond said three (3) months, no further leaves of absence shall be granted and the Employer shall have the right to regard such employee as having voluntarily quit his job.

Sec. 13.1. When an absence for illness extends beyond three (3) days, the employee shall present, upon his return to work, a satisfactory and reasonable proof of such illness.

Sec. 13.2. In the event of a death or similar emergency, such as acts of God, affecting a parent, spouse or child of an employee, the Employer in its sole discretion shall grant such employee an emergency leave of absence of not more than three (3) days per year, which emergency leave of absence shall not be charged against the employee's sick leave allowance.

Sec. 13.3. An employee who finds it necessary to be absent from work shall notify the Office Manager or her Department Head by telephone prior to 11 A.M. of that day.

ARTICLE XIV: MATERNITY LEAVE.

[fol. 26] Sec. 14.0. Whenever an employee shall become pregnant, she shall give prompt written notice thereof to the Employer. Whenever requested by the Employer, such employee should furnish a certificate from her physician stating: The approximate date of delivery; that she may continue to perform the duties of her current position; and the length of time she may continue to perform such work.

Sec. 14.1. At any time after the fifth month of pregnancy, the Employer, in its sole discretion, may require a pregnant employee to take a maternity leave without pay, or, at any time prior to the fifth month of pregnancy, such an employee may apply for such a leave of absence, without pay. In any case, the leave shall continue for no longer than nine (9) months.

Sec. 14.2. Upon returning to work after her delivery, such an employee shall be reinstated to her former position at her salary rate in effect at the beginning of her leave, together with any general wage increases granted to the entire bargaining unit during her absence. Seniority credit shall not accumulate during the period of any such leave of absence, that is, wherever in this agreement any employee benefit or right is measured by length of service, the duration of a maternity leave shall be deducted in computing the employee's total length of service or employment by the Employer. During any such leave of absence, the Employer may hire "temporary" employees as replacements, and said "temporary" employees, irrespective of the length of time employed in such "temporary" work, shall be discharged upon the return to work of the employee granted such maternity leave. Upon the latter's return to work within the time required, she shall be re-employed at her former position, provided she can resume and properly perform the duties of the position in which she was regularly employed at the time of the commencement of her leave. In [fol. 27] any event, the failure of such an employee to return to work upon the expiration of nine (9) months of Leave of Absence shall be deemed a voluntary resignation, which shall deprive such employee of her status as an employee, without recourse.

Sec. 14.3. All maternity leaves authorized by the Employer shall be in writing and signed by an officer of the Employer. The failure of any employee to comply with any of the provision of this article pertaining to pregnancy and maternity leaves shall be considered and deemed a resignation by such employee and as a voluntary abandonment of her employment without recourse.

Sec. 14.4. An employee who has been granted a maternity leave of absence shall be considered as having quit and resigned her position without notice, and her employment shall be deemed to have been terminated, if, while on such leave of absence, she engages in or applies for other employment without the written consent in writing of the Employer herein. Any employee who obtains a maternity leave of absence through fraud or misrepresentation shall be subject to discharge by the Employer without recourse of such employee to the grievance or arbitration provisions of this agreement.

Sec. 14.5. The foregoing provisions of this Article shall apply only to those employees who have been employed by the Employer for a period of eighteen (18) months or more. Employees with less than eighteen (18) months of service shall not be entitled to maternity leaves and shall not be entitled to reinstatement rights.

ARTICLE XV: WELFARE SECURITY BENEFITS.

Sec. 15.0. Effective February 1, 1960 the Employer shall pay to the "65 Security Plan" 9% of the total wages of all employees covered by this agreement inclusive of overtime, [fol. 28] bonuses, incentives and commissions up to and including a maximum of total wages per employee of $8,000.00 per annum, provided however, that the Employer shall have the benefit of the most favorable adjustment made available by the Plan to any other employer. In addition to the quarterly reports to be submitted by the Employer as provided in Section 15.1 hereof, the Employer shall submit to the "65 Security Plan" copies of W-2 Forms prepared by it for submission to the Internal Revenue Service covering earnings of employees covered by this agreement.

Sec. 15.1. Payments shall be made four (4) times per year on a quarterly basis, on or before the 15th day of January, April, July, or October, for the preceding quarter. A deposit equal to one quarterly payment shall be made with the 65 Security Plan at the inception of this agreement and shall remain on deposit during its lifetime. The deposit may be adjusted when necessary to conform with

fluctuations in the payroll, and it shall be returned to the Employer at the termination of this contract.

Sec. 15.2. The Union represents and warrants that the said "65 Security Plan" is now and shall at all times be administered pursuant to a trust agreement executed jointly by equal representatives of the Union and of representatives of Employers having collective bargaining agreements with the Union. The Union further represents and warrants that said "65 Security Plan" now provides for benefits to its members who are employed by the Employer herein, based upon the Employer's contribution as is set forth in the attached Exhibit "I", captioned "65 Security Plan in Brief."

Sec. 15.3. The Union represents and warrants that during the life of this agreement the minimum benefits inuring to the benefit of Employer's employees shall be the benefits referred to in Section "15.2" herein, and that said minimum [fol. 29] benefits shall not be decreased or diminished, or in any manner abrogated by the Trustees of the "65 Security Plan" or by the Union, without first obtaining the written consent thereto by the Employer, which consent the Employer agrees it will not unreasonably withhold.

Sec. 15.4. It is expressly understood and agreed that the Employer's sole financial obligation hereunder shall be the payment of contributions at the rate set forth in Section "15.0" and no more, irrespective and notwithstanding any of the terms or provisions contained in the Agreement and Declaration of Trust establishing the "65 Security Plan".

Sec. 15.5. The Union agrees that it will cause the Trustees of the "65 Security Plan" to give written notice to the Employer, or that the Union itself will give notice to the Employer concerning (1) any and all deaths, resignations, incapacitations or resignations or removals from office, or any other changes affecting the status or composition of current Employer Trustees; (2) any changes of insurance carriers or modifications of insurance policies; and (3) any change of any benefits or insurance coverages. In addition, the Union agrees that it, or the said Trustees, will furnish to the Employer a copy of the statement showing the re-

sults of the most recent annual audit prepared by the Plan's certified public accountant, together with copies of similar future statements, as prepared, whether annually or oftener.

Sec. 15.6. In the event that legislation is enacted by the Federal or State or municipal governments, levying a tax or other exaction upon the Employer for the purpose of establishing a federally, state or municipally administered system of life, health and accident, or hospitalization or medical insurance, under which the employees of the Employer are insured, the Employer shall be credited, against the sums payable under "Section 15.0" hereof, for each pay [fol. 30] period, with the amount of such tax or exaction payable by it for such pay period.

Sec. 15.7. In case of any failure to pay the amount due within the time prescribed, there shall be added to the installment payment due 5% of the amount due, if the failure is for not more than 30 days; with an additional 5% for each additional 30 days or fraction thereof, during which such failure continues, not exceeding 25% of the aggregate. The amount so added to any installment payment due shall be collected at the same time and in the same manner and as part of the payment due unless the payment shall have been made before the discovery of the neglect and failure, in which case the amount so added shall be collected and become due in the same manner as the installment payment. However, it is agreed that one month's delinquency shall be waived in the first instance of delinquency, and that the Employer may apply to the Board of Trustees for waiver of any additional payment as provided herein for just cause. The amounts provided for herein to be added to the installment payment shall be deemed and are considered as liquidated damages and shall be in payment of the cost and expense in effectuating collection of the said installments, the cost of enforcement of the agreement and of any interest which may accumulate by reason of late payment.

Sec. 15.8. The Employer further agrees to submit with each payment a list of all employees covered by this agreement, showing quarterly earnings of each employee, and

such other payroll information as may be required by The 65 Security Plan Office to guarantee the sound and efficient operation of the plan. The Security Plan Office shall have the right to examine payroll records of the Employer pertaining to said payments.

[fol. 31] Sec. 15.9. The 65 Security Plan agrees to provide the Employer semi-annually, on request, with a report of receipts and disbursements including benefits paid out.

Sec. 15.10. The agreements contained in this Article shall be considered as of the essence of this contract.

ARTICLE XVI: GRIEVANCES: ADJUSTMENTS OF DISPUTES: ARBITRATION.

Sec. 16.0. Any differences, grievance or dispute between the Employer and the Union arising out of or relating to this agreement, or its interpretation or application, or enforcement, shall be subject to the following procedures, which shall be resorted to as the sole means of obtaining adjustment of the difference, grievance, or dispute, hereinafter referred to as "grievance":

Step 1: The grievance, when it first arises, shall be the subject of a conference between the affected employee, a Union Steward and the Employer, officer or exempt supervisory person in charge of his department. The grievance shall be presented orally. If, at this step, the grievance is resolved to the mutual satisfaction of the parties, a memorandum stating the substance of the settlement shall be prepared and signed by the Employer representative and the affected employee. Copies of the same shall be furnished to the Union's Shop Steward and the Employer. In the event that the grievance is not satisfactorily settled within two (2) working days after the conclusion of the conference stated above, the grievance shall be reduced to writing. It shall state the nature of the claim made and the objections raised thereto and shall be signed by the Employer representative and the affected employee.

Step 2: Within five (5) working days thereafter, the grievance shall be the subject of a conference between an

[fol. 32] officer of the Employer, or the Employer's representative designated for that purpose, the Union Shop Committee and/or a representative of the Union, at which conference the parties will endeavor to resolve and settle the grievance.

Step 3: In the event that the grievance shall not have been resolved or settled in "Step 2", the grievance shall be referred and submitted to arbitration before an impartial arbitrator who shall be chosen by the mutual consent in writing by the Employer and the Union. All grievances not satisfactorily adjusted within two (2) weeks from their inception shall be referred to arbitration, unless such time shall be extended in writing by Employer and the Union.

Sec. 16.1. In the event that the parties fail to agree upon an impartial arbitrator, as provided in "Step 3", the impartial arbitrator, by the filing of a demand for arbitration by the aggrieved party, shall be selected and designated by the American Arbitration Association, pursuant to whose Rules for its Voluntary Labor Arbitration Tribunal, any and all arbitrations shall be conducted.

Sec. 16.2. The arbitrator finally designated to serve in that capacity, after receiving a written statement signed jointly by the Employer and the Union certifying to his selection and designation as aforesaid and containing a concise statement of the issue involved, shall conduct the arbitration in accordance with the Arbitration Law of the State of New York. The decision of the Arbitrator shall be final and binding upon the parties. All expenses incidental to the arbitrator's services, if any, shall be borne equally by the Employer and the Union.

Sec. 16.3. It is agreed that time is of the essence in any arbitration, and both parties will exert their best efforts to obtain a speedy decision.

[fol. 33] Sec. 16.4. It is expressly agreed that there shall be no strike, slow-downs or suspension of work of any nature while a grievance is in the process of negotiation and disposition under the grievance and arbitration procedures of this Article.

Sec. 16.5. It is agreed that, in addition to other provisions elsewhere contained in this agreement which expressly deny arbitration to specific events, situations or contract provisions, the following matters shall not be subject to the arbitration provisions of this agreement:

(1) the amendment or modification of the terms and provisions of this agreement;

(2) salary or minimum wage rates as set forth herein;

(3) matters not covered by this agreement; and

(4) any dispute arising out of any question pertaining to the renewal or extension of this agreement.

Sec. 16.6. The status in effect prior to the assertion of a grievance or the existence of any controversy or dispute shall be maintained pending a settlement or decision thereof. Notice of any grievance must be filed with the Employer and with the Union Shop Steward within four (4) weeks after its occurrence or latest existence. The failure by either party to file the grievance within this time limitation shall be construed and be deemed to be an abandonment of the grievance.

Sec. 16.7. Nothing contained in this Article shall be deemed to be a restriction or limitation of the rights of the Employer, or the Union, or an individual employee, or a group of employees, as specified in Section 9(a) of the Labor Management Relations Act, 1947, as amended. However, whenever any meetings or conferences are held with the Employer during business hours, the Union's employee-[fol. 34] representatives shall be limited to only two (2) employees. During negotiations for the renewal of this agreement, the Union's negotiating committee shall be limited to no more than three (3) employees. Except in emergency situations, employees shall not discuss grievances with Stewards during regular working hours.

Sec. 16.8. Grievances or disputes arising out of this agreement shall not be combined or accumulated and sub-

mitted as a part of one case or arbitration proceeding. Accordingly, no arbitrator shall have the authority to hear or determine more than one (1) grievance, unless several grievances arise out of the same common state of facts, and are relevant and germane to one another. Whenever any provision in this agreement reserves to the Employer the right to exercise its sole discretion or judgment with respect to specific subjects, events, matters or situations, the exercise or non-exercise of such discretion or judgment shall not be arbitrable.

Sec. 16.9. Except for threatened breaches or actual breaches of the provisions of Article "25" of this agreement, the arbitration procedure herein set forth is the sole and exclusive remedy of the parties hereto and the employees covered hereby, for any claimed violations of this contract, and for any and all acts or omissions claimed to have been committed by either party during the term of this agreement, and such arbitration procedure shall be (except to enforce, vacate, or modify awards) in lieu of any and all other remedies, forums at law, in equity or otherwise which will or may be available to either of the parties. The waiver of all other remedies and forums herein set forth shall apply to the parties hereto, and to all of the employees covered by this contract. No individual employee may initiate an arbitration proceeding.

[fol. 35] Article XVII: The Union as the Bargaining Representative.

Sec. 17.0. The Union shall require its members to comply with the terms of this agreement. The parties agree that the maintenance of a peaceable and constructive relationship between them and between the Employer and the employees requires the establishment and cooperative use of the machinery provided for in this contract for the discussion and determination of grievances and disputes, and that it would detract from this relationship if individual employees or groups of employees would either, as such individuals or groups, seek to interpret or enforce the contract on their own initiative or responsibility. It is, therefore, agreed that this contract shall not vest or

create in any employee or group of employees covered thereby any rights or remedies which they or any of them can enforce either at law, equity, or otherwise, it being understood and agreed, that all of the rights and privileges created or implied from this contract shall be enforceable only by the parties hereto and only in the manner established by this contract.

Sec. 17.1. Union business and activity shall not be conducted at any time on the Employer's premises either during, or after business hours, it being the intention of this provision to prohibit the holding of meetings or the congregation of employees in any part of the Employer's establishments at any time.

ARTICLE XVIII: MANAGEMENT RIGHTS: EFFICIENT OPERATION.

Sec. 18.0. Nothing in this agreement shall limit the employer in the exercise of its function of management under which it shall have, among others, the rights: to hire new employees and to arrange and direct its entire working forces and allocate and determine the time, place and [fol. 36] manner of work; to discipline or discharge employees for just cause; to transfer or lay off employees because of lack of work or for other legitimate reasons; to decide the number and location of its establishments, its operations, policies and the services, products or goods to be handled, processed, manufactured or sold; and the methods and schedules of work, including the means, methods, techniques and processes of operation, as well as the establishment of new departments and the relocation, discontinuance or closing of existing departments or portions thereof, or any establishment now or hereafter operated by it, *provided* that the Employer shall not use these prerogatives for the purpose of discrimination or contrary to the specific terms of this agreement. It is expressly understood that the enumerations in this Article of management rights and prerogatives reserved shall not be deemed to exclude other prerogatives of rights not enumerated.

Sec. 18.1. The Employer shall have the right to promulgate reasonable rules and regulations to maintain discipline and control and use of its premises and to govern the work, conduct and safety of employees, *provided* the same are not inconsistent with the provisions of this agreement.

Sec. 18.2. The Union recognizes that the Employer has the right to require from its employees efficient service in the performance of their duties and that, in the interpretation of this agreement, recognition shall be given to the necessity for the efficient and economical operation of the Employer's business. The Union also recognizes that the determination of the organization of each branch and department of its establishments, the determination of policies affecting the selection and work assignment of its entire personnel and staff, as well as the establishment of quality and performance standards and the judgment of workmanship required, likewise are rights vested exclusively in the Employer.

[fol. 37]. Sec. 18.3. Employees shall not perform services, directly or indirectly, for any person, firm or corporation in direct competition with any phase of the Employer's business, without the permission of the Employer.

ARTICLE XIX: COOPERATION.

Sec. 19.0. The Employer and the Union agree to cooperate to reduce absenteeism and lateness, to prevent waste or destruction, to eliminate frivolous grievances and to enforce this agreement.

ARTICLE XX: BULLETIN BOARD.

Sec. 20.0. The Employer shall provide space for a bulletin board in a reasonably accessible place for union notices. The union agrees that this right shall not be abused, and that this bulletin board will not be used for political notices or purposes.

ARTICLE XXI: MINORS.

Sec. 21.0. It is agreed that no minor under the age of 18 years shall be employed by the Employer.

ARTICLE XXII: MILITARY SERVICE.

Sec. 22.0. Employees who have left the employ of the Employer to enter the Armed Services of the United States, shall be returned to work and granted all reemployment rights and privileges occurring in their favor, in accordance with the Federal Selective Training and Service Act, as amended.

ARTICLE XXIII: SEVERANCE PAY.

Sec. 23.0. Employees (1) discharged for cause, as limited below, and not thereafter rehired or reinstated, or (2) who are laid off by the employer for an indefinite period of [fol. 38] time, or for a specific period of more than thirty (30) days, and who have rendered at least six (6) months continuous service with the employer, shall receive severance pay, as follows:

Over six (6) months and under one year of continuous service	1 week
Over one (1) year and under two years of continuous service	2 weeks
Over two (2) years and under four years of continuous service	3 weeks
Over four (4) years and under seven years of continuous service	4 weeks
Over seven (7) years and under ten years of continuous service	5 weeks
Over ten (10) years of continuous service	6 weeks

Severance pay shall be computed on the basis of the employee's regular weekly rate of pay in effect at the time of such layoff.

Sec. 23.1. Employees (1) discharged for cause prior to the completion of one (1) year of continuous service, or (2) who are at any time "discharged for gross misconduct", as defined by Sec. 7.01, or (3) who at any time voluntarily resign, shall not be entitled to severance pay. However, when a voluntary resignation is caused by marriage or pregnancy or permanent retirement from the labor market or permanent physical disability, such a resignation shall entitle the employee to severance pay, computed at the applicable rate set forth in Section "23.0" and provided that such employee submits to the Employer reasonable and sworn written proof stating the facts causing the resignation. Whenever such a resignation results from marriage [fol. 39] or pregnancy or permanent retirement from the labor market, severance pay shall be payable three (3) months after the effective date of such resignation. When such a resignation results from permanent physical disability severance pay shall be payable on the effective date of such resignation.

ARTICLE XXIV: EFFECTIVE DATE.

Sec. 24.0. Except as otherwise provided for in Sections "9.0" and "10.0", this agreement shall go into effect as of February 1, 1960, and shall continue in full force and effect for a term of two (2) years ending January 31, 1962; and it shall automatically be renewed from year to year thereafter to February 1st of successive years, unless notifications be given in writing by either party to the other, by registered mail, at least sixty (60) days prior to the expiration of this agreement, that changes in the agreement are desired.

ARTICLE XXV: STRIKES AND LOCKOUTS.

Sec. 25.0. No strikes, sympathetic strikes, picketing, lockouts, slowdowns, stoppages of work, or boycotts of any nature by the Union or any of its members, or lockouts by the Employer, shall take place during the term of this agreement.

ARTICLE XXVI: GUARANTEES; NO REDUCTION IN RATES.

Sec. 26.0. There shall be no reduction in the rate of pay of any employee; nor shall any employee be dismissed as a consequence of the making of this agreement, except for breaches thereof.

ARTICLE XXVII: NO DISCRIMINATION; NO COERCION.

Sec. 27.0. The Employer will not interfere with, restrain, or coerce the employees covered by this agreement because of membership in or activity in behalf of the Union. [fol. 40] The Employer will not discriminate in respect to hire, tenure of employment, or any term or condition of employment against any employee covered by this agreement because of membership in or activity on behalf of the Union, nor will it discourage or attempt to discourage membership in the Union or attempt to encourage membership in another Union.

Sec. 27.1. The Union will not restrain or coerce (a) employees in the exercise of their rights of self-organization, to bargain collectively, and to engage in other concerted activities or to refrain from any or all such activities; or (b) the Employer in its selection of representatives for the purposes of bargaining or grievance settlement. The Union will not cause the Employer to discriminate against employees by reason of employees exercising or refraining from exercising their rights mentioned above; nor will the Union cause the Employer to discriminate against an employee whose membership in the Union has been denied or terminated on some ground other than his failure to tender periodic dues and reasonable and non-discriminatory initiation fees, nor will the Union and its members (whether employed by the Employer or elsewhere) interfere with, restrain, coerce, intimidate harass employees who are not members of the Union.

ARTICLE XXVIII: MODIFICATION.

Sec. 28.0. It is specifically understood that this agreement may not be modified by an employee or group of

employees without the joint consent in writing of the Union and the Employer.

ARTICLE XXIX: UNION VISITATION.

Sec. 29.0. It is agreed that a duly accredited representative of the Union shall, on notice to and with the permission of, the Company, be entitled to access to the Em- [fol. 41] ployer's establishments during the regular working hours for the purpose of investigating and adjusting complaints and grievances. Said representative shall not during his visits hinder or interfere with the work of employees or any of the Company's operations. The company shall provide a place in which the Union's representative may consult in private with Union stewards for a reasonable period of time.

ARTICLE XXX: EXCLUSIVENESS OF AGREEMENT: APPLICABLE LAW: TERMINOLOGY.

Sec. 30.0. This agreement and each of its provisions, together with the appendix "A" and Exhibit I, referred to herein, contain and embody the whole agreement of the parties, and it is agreed that there are no promises, terms, conditions or obligations referring to the subject matter thereof other than those contained herein.

Sec. 30.1. This agreement and all of its terms and conditions shall be subjected to any and all applicable laws of the State of New York and the United States of America and the regulations of any State or Federal governmental agency having jurisdiction over the business and affairs of the Employer or the subject matter contained in this agreement.

Sec. 30.2. The use of the masculine in this contract shall include the feminine as well. The use of the singular shall include the plural as well. "Employer" where used shall mean and refer to both corporate employers who are parties hereto. Wherever used, the term "employee" shall mean and apply only to the Employees in the above-described "bargaining unit".

[fol. 42] IN WITNESS WHEREOF, the parties hereto have interchangeably caused their duly authorized representatives to execute the within agreement the day and year first above written.

INTERSCIENCE PUBLISHERS, INC.

INTERSCIENCE ENCYCLOPEDIA, INC.

By C. J. MOSBACHER, JR.
Vice President

DISTRICT 65, RETAIL, WHOLESALE DEPARTMENT STORE UNION, A.F.L.-C.I.O.

By ALBERT R. TURBANE
Organizer

ANNA LION, Steward

[fol. 43]

APPENDIX A, ANNEXED TO EXHIBIT A

Job Classification

Grade	*Minimum Salaries*	1960-61	1961-62
I	—*Clerks*—with following skills— Stock-Mail Typist Filing Billing	66.50	68.50
I(a)	—*Clerks*—with following additional skills Relief Switchboard Operator Relief Machine Operator Relief Typist and Varitypist	69.50	71.50
II	—With following skills Stenographer I Typist and Varitypist Production Assistant Illustration Assistant		

	Promotion Assistant Assistant Subscription Clerk Assistant to Order Analyzer Assistant Bookkeeper Machine Operator	71.50	73.50
III	—With following skills— Order Analyzer Receptionist-Typist-Switchboard Operator Stenographer II	76.50	78.50
IV	—Bookkeeper Chief Subscription Clerk	81.50	83.50

CLERK'S NOTE RE EXHIBIT 1, ANNEXED TO EXHIBIT A

65 Security Plan in Brief

Same as Exhibit annexed to Affidavit of Irving Rozen printed herein at pages 49-50.

[fol. 44]

EXHIBIT B TO COMPLAINT

INTERSCIENCE PUBLISHERS, INC.
250 Fifth Avenue, New York 1, N. Y.
LEXINGTON 2-1727

Executive Offices — April 8, 1960

District 65, AFL-CIO

RWSDU

13 Astor Place
New York 3, New York

RE: Interscience Publishers, Inc.

Gentlemen:

We confirm our statement that during the term of the collective bargaining agreement in effect as of February 1,

1960 the Company will not reduce by lay-off the number of jobs in the Collective Bargaining Unit to less than twenty-six (26). Absentees for vacation, sickness, etc. shall be deemed employed. Open positions for which qualified help is being sought shall be deemed filled jobs. Nothing herein shall affect the right of the employer to discharge or discipline for cause.

If, however, at any time during the term of the collective bargaining agreement, the Company should consider that the foregoing would cause it hardship, or would be inequitable or uneconomic, the Union and the Company will leave to arbitration how many jobs in the Collective Bargaining Unit (twenty-six (26) or less) are to be maintained by the Company.

[fol. 45] We also confirm our agreement that prior to any future appointment of an "assistant to department head" there shall be a discussion with the Union steward and the committee concerning the duties to be performed.

Very truly yours,

INTERSCIENCE PUBLISHERS, INC.

/s/ C. J. MOSBACHER, JR.
C. J. Mosbacher, Jr.
Vice President

CJMJr/vfb
cc: Mr. Lieb

[fol. 46]

EXHIBIT C TO COMPLAINT

INTERSCIENCE PUBLISHERS, INC.
250 Fifth Avenue, New York 1, N. Y.
LEXINGTON 2-1727

Executive Offices — March 6, 1961

District 65, A.F.L.-C.I.O.

Retail, Wholesale and Department
Store Union

13 Astor Place
New York 3, New York

Attention: Mr. Al Turbane, Organizer

Gentlemen:

In accordance with your request, we are willing to modify Section 2.0 of the existing contract between Interscience Publishers, Inc. and the Union. This section will be amended to read as follows:

Sec. 2.0. Upon written notice from the Union, the Employer will deduct all Union membership dues as provided in the authorization form set forth below, upon condition that, at the time of such notice, the Union shall furnish the Employer with a written authorization executed by the Employee in the following form:

"I hereby authorize and direct my employer to deduct from my wages and to pay over to the Union on notice from the Union such amounts including initiation fees and assessments (if any owing by me) as my membership dues in said Union as may be established by the Union and become due to it from me during the effective period of this authorization. This authorization may be revoked by me as of any [fol. 47] anniversary date hereof by written notice signed by me of such revocation, received by my Employer and the Union, by registered mail, return receipt requested,

not more than sixty (60) days and not less than fifty (50) days, before any such anniversary date, or on termination date of the collective bargaining agreement covering my employment, by like notice prior to such termination date, whichever occurs the sooner."

This letter is being sent to you in duplicate; please sign and return one copy to us so that we may incorporate it as part of the contract. The second copy, which we have already signed, should be incorporated into your master copy of the contract.

Very truly yours,

INTERSCIENCE PUBLISHERS, INC.

/s/ C. J. MOSBACHER, JR.
C. J. Mosbacher, Jr.
Vice President

CJMJr/vfb

FOR DISTRICT 65, RWDSU, AFL-CIO:
ALBERT R. TURBANE

[fol. 48]

EXHIBIT D TO COMPLAINT

Names re. Seniority	Date empt. began	Duration of service	Age	Salary
Hazel Sinclair, Clerk, Bkkp.	5/25/50	11-1/3 years	11/14	$ 87.95
Anna Lion, Asst. Bkkpr.	11/22/50	10-5/6 "	3/01	$104.45
Margit Porias, Head Order D.	8/17/51	over 10 "	6/27	$123.95
Anne Evans, Order An'yst.	8/13/51	" 10 "	4/25	$ 87.95
Margarita Toro, Bkkpg.	10/ 1/51	approx. 10 "	12/27	$ 90.45
Louis Druker, Mailing	10/25/51	" 10 "	8/01	$ 86.95
Anna Goldstein, Filing	12/10/51	9-5/6 "	1/11	$ 88.45
Adelaide Prenner, Filing	11/ 3/54	7-1/2 "	8/03	$ 88.95
Sophie Druker, Production	8/15/55	over 6 "	11/04	$ 94.70
Clodeaner Smalls, Order	8/ 2/56	" 5 "	9/25	$ 97.20
Ester Weinstein, Editl.	8/ 6/56	" 5 "	12/05	$ 92.70

Names re. Seniority	Date empt. began	Duration of service	Age	Salary
Esther Gilbert, Swtchbd.	11/12/56	approx. 5 years	6/27	$ 98.95
Esther Rothberg, Hd. Bkkpr.	3/ 4/57	4-1/2 "	6/05	$124.45
Janet Murray, Subscription	4/ 5/57	4-1/2 "	7/02	$121.95
Hoyt Peters, Promotion	4/10/57	4-1/2 "	3/27	$ 90.95
Sadie Brown, Sec. to Mr. K.	2/28/58	3-2/3 "	7/20	$ 96.00
Herbert Hart, Mailing	1/ 5/59	2-5/6 "	10/32	$ 78.70
Bernice MacFarlane, Sec. Mrs. O.	3/ 9/59	2-1/2 "	12/24	$ 98.70
Loretta Baer, Production	6/18/59	2-1/3 "	6/39	$ 82.70
Inez Oliveri, Bkpg.	9/14/59	2 "	1/37	$ 81.00
D. Leni Calabro, Order	10/ 9/59	Approx. 2 "	1/35	$ 86.00
Evelyn Shinohara, Editl.	10/21/59	" 2 "	10/13	$ 81.00
Europa MacIntosh, Order.	12/ 3/59	1-2/3 "	11/20	$ 97.00
Florence de Sola, Bkkpg.	5/24/60	1-1/2 "	5/30	$ 83.00
Jimmie Brown, Editl.	6/ 6/60	1-1/2 "	3/34	$ 80.00
Hannah Robins, Subscr.	10/17/60	1 "	—	$ 78.00
Bessie Micucci, Steno.	10/ 1/60	1 "	1/11	$ 78.00
Hazel Levson, Production	11/ 2/60	less 1 year	9/59	$ 83.00
[fol. 49]				
Vernon Brown, Editl. Typ.	12/ 5/60	10 months	10/18	$ 78.00
Doris Hutton, Sec. Dr. I.	1/ 5/61	9 "	—	$ 93.00
Ed. Peele, Typist	2/20/61	7 "	—	$ 75.00
Helen Parham, Steno.	4/21/61	5 "	10/33	$ 85.00
Irene Stein, Production	5/15/61	4-1/2 "	4/35	$ 85.00
Denise Koechlin, Prom. Typ.	6/ 5/61	4 "	—	$ 80.00
Lila McGuire, Steno.	7/14/61	2-1/2 "	—	$ 90.00
Irene Polan, Typist	8/ 2/61	2 "	—	$ 70.00
Mary Anderson, Typist	8/ 3/61	2 "	—	$ 85.00
Mary Morrison, Typist	8/ 7/61	2 "	—	$ 75.00
Carmen Garcia, Typist	8/21/61	1 "	4/31	$ 75.00
I. Rosenberg, Promotion	9/14/61			$ 90.00

[fol. 50]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

ORDER TO SHOW CAUSE—January 24, 1962

Upon the annexed petition of David Livingston, as President of District 65, R.W.D.S.U., AFL-CIO, (hereinafter called the "Union"), duly verified the 24th day of January, 1962, and upon the exhibits annexed hereto, and upon all the papers and proceedings had herein, it is

Ordered, that John Wiley & Sons, Inc., the defendant herein, show cause at a Motion Term of this Court to be held at the United States Courthouse, Room 506, Foley Square, Borough of Manhattan, City and State of New York, on the 30th day of January, 1962, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why an order should not be made directing that said Company submit to arbitration with the said Union on the following issues:

(a) Whether the seniority rights built up by the Interscience employees must be accorded to said employees now and after January 30, 1962;

(b) Whether, as part of the wage structure of the employees, the Company is under an obligation to continue to make contributions to District 65 Security Plan and District 65 Security Plan Pension Fund now and after January 30, 1962;

(c) Whether the job security and grievance provisions of the contract between the parties shall continue in full force and effect;

[fol. 51] (d) Whether the Company must obligate itself to continue liable now and after January 30, 1962 as to severance pay under the contract;

(e) Whether the Company must obligate itself to continue liable now and after January 30, 1962 for vacation pay under the contract;

and directing said Company to proceed with arbitration to final award; and why the Union should not have such other and further and different relief as to this Court may seem just and proper in the premises; and it is further

Ordered, that the Company serve answering affidavits, if any, upon the Union, one day prior to the return date hereof; and

Sufficient reason appearing therefor, let the service of a copy of this Order, together with a copy of the papers upon which the same is granted, upon Paskus, Gordon & Hyman, Attorneys for the Company, of 733 Third Avenue, New York 17, New York, on or before the 25th day of January, 1962, be deemed sufficient.

Dated: New York, N. Y., January 24, 1962.

Richard N. Levet, U.S.D.J.

[fol. 52]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION

The petition of David Livingston, as President of District 65, R.W.D.S.U., AFL-CIO, respectfully shows:

1. Petitioner, hereinafter called "Union" is a labor organization with offices at 13 Astor Place, City, County and State of New York, with a membership upwards of 30,000 individuals and is in collective bargaining relationship with upwards of 2,000 employers in and about the City of New York.

2. Attached hereto and marked "Exhibit 1" is a Copy of the Complaint herein, and all the allegations of said complaint are hereby incorporated herein by reference as if repeated herein in full.

3. As more fully set forth in said Complaint, petitioner was in collective bargaining relationship with Interscience Publishers, Inc. when the latter corporation consolidated on

October 2, 1961 with the defendant Company herein. After some negotiations the forty employees theretofore employed at Interscience were continued in the employ of the defendant, but thus far defendant has refused to honor the collective bargaining agreement and has refused to commit itself with respect to any continuing relationship between itself and the Union and or the former employees of Interscience.

[fol. 53] 4. Specifically, thus far the Company has refused:

To accord the said employees the seniority rights which they had built up while employed by Interscience;

To pay pension and health and welfare contributions to the District 65 Security and Pension Plan;

To recognize its obligations with respect to job security, and grievance and arbitration procedures;

To obligate itself to pay the severance pay vested in the former Interscience employees; and

To accord to the employees their vested vacation rights.

The Company takes the position that notwithstanding the current collective bargaining agreement and Section 90 of the Stock Corporation Law and the general law, the consolidation between Interscience and the Company terminated the said collective bargaining agreement and all the property rights vested in the employees while employed at Interscience.

5. The Union takes the position that the collective bargaining agreement continues, and notwithstanding any alleged claim that the consolidation of the two corporations terminated the contract with the Union, the law is clear that the earned or vested rights of the employees continue even after the expiration of the contract. This was the holding of the United States Court of Appeals for the Second Circuit, in the case of *Zdanok* v. *Glidden Company*, 288 Fed. (2) 99

where the Court held, among other things, that seniority rights are earned or vested rights which survive the expiration of the contract.

In an article by Eugene A. Hoffman, Esq., Labor Relations Manager for the Minneapolis-Honeywell Regulator Co. of Minneapolis, Minnesota, presented to the Industrial Relations Committee, National Association of Manufacturers and published by the association, entitled *"Do the* [fol. 54] *Seniority Rights of Employees Survive an Expired Contract?"*, it is stated: (In discussing *Zdanok* v. *Glidden*)

> "Presumably, if one accepts the idea that seniority becomes a vested right, there is no reason to prevent carrying the thought to its logical conclusion and assume that a wage rate, once earned, is also a vested right."

6. As found by the *Glidden* case, the plaintiff Union, therefore respectfully submits that (a) in addition to the seniority rights of which the company wrongfully seeks to deprive its employees, the Company is in violation of its employees' rights in (b) failing to pay security and pension plan contributions to the 65 Plans and (c) in failing to accord to the employees, job security and grievance and arbitration proceedings as specified in the collective bargaining agreement and in failing to obligate itself with respect to (d) severance pay and (e) vacation pay. Hence this action is being brought by the Union to compel arbitration by the Company, on the issues specifically set forth in the complaint herein, as follows:

> (a) Whether the seniority rights built up by the Interscience employees must be accorded to said employees now and after January 30, 1962.
>
> (b) Whether, as part of the wage structure of the employees, the Company is under an obligation to continue to make contributions to District 65 Security Plan and District 65 Security Plan Pension Fund now and after January 30, 1962.

(c) Whether the job security and grievance provisions of the contract between the parties shall continue in full force and effect.

[fol. 55] (d) Whether the Company must obligate itself to continue liable now and after January 30, 1962 as to severance pay under the contract.

(e) Whether the Company must obligate itself to continue liable now and after January 30, 1962 for vacation pay under the contract.

7. An Order to Show Cause is requested of the Court for the reason that the arbitration clause of the contract between the parties, provides in part as follows:

Sec. 16.3. Article XVI: Grievances: Adjustments of Disputes: Arbitration

"It is agreed that time is of the essence in any arbitration, and both parties will exert their best efforts to obtain a speedy decision."

No prior application has been made for this or similar relief.

8. Your petitioner has had several conferences with Paskus, Gordon and Hyman, Esqs., the Law firm representing Interscience and the defendant.

Wherefore, your petitioner respectfully prays that an order be made herein requiring John Wiley & Sons, Inc., to proceed to arbitration on the issues herein set forth.

David Livingston, as President of District 65, R.W.D.S.U., AFL-CIO.

(Verified on January 24, 1962.)

Clerk's Note Re Exhibit "1" Annexed to Petition

Complaint

(Set forth in full at pages 3-42, herein.)

[fol. 56]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF IRVING ROZEN, IN SUPPORT OF MOTION —January 24, 1962

State of New York,
County of New York, ss.:

Irving Rozen being duly sworn, deposes and says:

I am an attorney and counselor-at-law, and a member of the firm of Weisman, Allan, Spett & Sheinberg, attorneys for the plaintiff herein.

I asked Harold Faggen Associates, Inc., union pension fund actuaries, to analyze the pension rights of the employees of Interscience Publishers, Inc., under the Wiley Plan (the plan of defendant Company), and under the 65 Plan (the plan of plaintiff Union), and I attach hereto and make part of this affidavit a chart showing such comparison.

This chart shows, in the main, that the employees' annual pension, under the 65 Plan, is greatly superior to that under the Wiley Plan; and therefore, the discontinuance of pension payments by defendant into the 65 Plan has damaged the plaintiff.

Irving Rozen

(Sworn to January 24, 1962.)

[fol. 57]

CHART ANNEXED TO FOREGOING AFFIDAVIT

SCHEDULE OF PROJECTED ANNUAL PENSIONS

UNDER

EMPLOYEE'S RETIREMENT PLAN OF JOHN WILEY & SONS, INC.

AND

THE 65 SECURITY PLAN PENSION FUND

(At Age 65)

Name of Employee	*Pension Under Wiley Plan*	*65 Plan*
Hazel Sinclair	777	1,200
Anna Lion	73	–0–
Margit Porias	2,291	1,980
Ann Evans	1,303	1,800
Margarita Toro	1,496	1,980
Louis Druker	–0–	–0–
Anna Goldstein	475	960
Adelaide Prenner	–0–	600
Sophie Druker	–0–	–0–
Clodeaner Smalls	1,203	1,860
Esther Weinstein	–0–	660
Esther Gilbert	1,296	1,980
Esther Rothberg	71	660
Janet Murray	–0–	–0–
Hoyt Peters	1,130	1,920
Sadie Brown	761	1,560
Herbert Hart	1,198	2,280

[fol. 58]

Name of Employee	*Pension Under Wiley Plan*	*65 Plan*
Bernice MacFarlane	1,021	1,800
Loretta Baer	1,442	2,700
Inez Oliveri	1,373	2,520
D. Lem Calabro	1,353	2,400
Evelyn Shinohara	146	1,140
Europa MacIntosh	686	1,560
Florence deSola	1,018	2,100
Jimmie Brown	1,172	2,280
Bessie Mecucci	-0-	900
Hazel Levson	1,277	2,340
Vernon Brown	331	1,320
Irene Stein	1,280	2,340
Carmen Garcia	879	1,860
Helen Parham	1,186	2,040

OEIU 153, AFL-CIO

[fol. 59]

IN UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF NEW YORK

62 Civ. 378

Weisman, Allan, Spett & Sheinberg, Esqs., Attorneys for Plaintiff; Irving Rozen, Esq., Of Counsel; 1501 Broadway, New York 36, New York.

Paskus, Gordon & Hyman, Esqs., Attorneys for Defendant; Charles H. Lieb, Esq., Robert H. Bloom, Esq., Of Counsel; 733 Third Avenue, New York 17, New York.

OPINION—March 29, 1962

SUGARMAN, *D. J.*

On February 1, 1960 Interscience Publishers, Inc., a New York corporation (herein Interscience or Employer), entered into a contract with District 65, Retail, Wholesale & Department Store Union, AFL-CIO (herein the Union), wherein Interscience recognized the Union as exclusive bargaining agent of the clerical and shipping employees of Interscience. The contract was for a term ending January 31, 1962 and provided for its automatic renewal unless notification by either party 60 days before an expiration date that changes in the agreement were desired.

On April 8, 1960 Interscience and the Union amended the contract to provide that the collective bargaining unit would not be reduced by lay-off below 26 employees. On [fol. 60] March 6, 1961 Interscience and the Union amended the contract with respect to the check-off provisions thereof.

Article XVI of the agreement of February 1, 1960 deals with "Grievances: Adjustment of Disputes: Arbitration". Section 16.0 provides that differences, grievances or disputes between Interscience and the Union arising out of or relating to the agreement, its interpretation, application or enforcement "shall be subject to the following procedures, which shall be resorted to as the sole means of obtaining adjustment of the difference, grievance, or dis-

pute". Section 16.0 then sets up three steps as to the "procedures".

The first step provides that when the grievance first arises it "shall be the subject of a conference between the affected employee, a Union Steward and the Employer, officer or exempt supervisory person in charge of his department". If the grievance is not satisfactorily settled within two working days after the conference, it is to be reduced to writing and "signed by the Employer representative and the affected employee".

The second step provides that within five working days after its reduction to writing the grievance should be the subject of a conference between an officer of the Employer or its representative and the Union Shop Committee or its representative.

The third step provides that in the event that the grievance is not resolved in step two it "shall be referred and submitted to arbitration before an impartial arbitrator who shall be chosen by the mutual consent in writing by the Employer and the Union".

Section 16.1 provides for the method of selecting an impartial arbitrator if the parties fail to agree upon an arbitrator pursuant to step three of Section 16.0. The remaining sections of Article XVI deal with how the parties shall conduct themselves while the arbitration is pending.

On August 11, 1961 Interscience entered into an agreement with John Wiley & Sons, Inc. which resulted in the [fol. 61] consolidation on October 2, 1961 of John Wiley & Sons, Inc. and Interscience into the defendant consolidated corporation John Wiley & Sons, Inc. (herein Wiley and the Company). No one contends that the consolidation was intended to enable Interscience to run away from its agreement with the Union or that the consolidation of Interscience and John Wiley & Sons, Inc. into Wiley was for anything other than bona fide business reasons.

Both before and after the consolidation on October 2, 1961, the Union contended that Wiley was bound to recognize it as the exclusive bargaining agent of the clerical and shipping employees of Interscience who had been merged into the Wiley organization. Upon the continued refusal of Wiley to accede to the demands of the Union,

the latter filed a complaint in this court on January 23, 1962, demanding judgment "directing that the defendant [Wiley] be compelled to submit to arbitration on the questions herein referred to, and directing said defendant to proceed with said arbitration to final award, together with costs and disbursements of this action". The complaint predicates jurisdiction of the cause upon "Section 301 of the Labor-Management Relations Act, * * * 29 U. S. C. Sec. 185 and the United States Arbitration Act, Title 9, U. S. C."

The Union by order to show cause returnable January 30, 1962 and adjourned to and argued on March 6, 1962, seeks an order directing Wiley to "submit to arbitration with the said Union on the following issues:

> (a) Whether the seniority rights built up by the Interscience employees must be accorded to said employees now and after January 30, 1962;
>
> (b) Whether, as part of the wage structure of the employees, the Company is under an obligation to continue to make contributions to District 65 Security Plan and District 65 Security Plan Pension Fund now and after January 30, 1962;
>
> [fol. 62] (c) Whether the job security and grievance provisions of the contract between the parties shall continue in full force and effect;
>
> (d) Whether the Company must obligate itself to continue liable now and after January 30, 1962 as to severance pay under the contract;
>
> (e) Whether the Company must obligate itself to continue liable now and after January 30, 1962 for vacation pay under the contract;
>
> and directing said Company to proceed with arbitration to final award; and why the Union should not have such other and further and different relief as to this Court may seem just and proper in the premises * * * *"

The Union *inter alia* argues that Section 90 of the Stock Corporation Law of the State of New York binds Wiley to

observe the contract of February 1, 1960 between Interscience and the Union notwithstanding the consolidation. The pertinent portion of Section 90 provides that:

> "such consolidated corporation shall be deemed to have assumed and shall be liable for all liabilities and obligations of each of the corporations consolidated in the same manner as if such consolidated corporation had itself incurred such liabilities or obligations".

Wiley *inter alia* argues that the contract between Interscience and the Union came to an end upon the consolidation on October 2, 1961 and that it is not bound to recognize or deal with the Union as the bargaining agent for the employees formerly represented by the Union and absorbed into the Wiley organization.

Assuming that the Union's contention that its agreement with Interscience survived the consolidation and that Wiley [fol. 63] is bound to observe its terms, it must nevertheless fail on this motion. Section 16.6 of the agreement provides that:

> "Notice of any grievance must be filed with the Employer and with the Union Shop Steward within four (4) weeks after its occurrence or latest existence. The failure by either party to file the grievance within this time limitation shall be construed and be deemed to be an abandonment of the grievance."

It is undisputed that no notice of any grievance was so filed within four weeks after its occurrence nor were any of the procedures set up in Article XVI of the contract followed herein.

Arbitration is a contract obligation and we must look within the four corners of the contract which it is asserted makes a dispute arbitrable. The entire structure of Article XVI of the contract of February 1, 1960 in my view contemplates arbitration of a grievance between an "affected employee" represented by the Union, and the Employer. The contract does not indicate that arbitration was within the contemplation of the parties under the facts at hand, i.e., a consolidation of the Employer with a third party and its effect upon the rights of the individual employees within

the collective bargaining group and upon the Union as their exclusive bargaining agent.

It is fair to conclude that it was the intention of the parties to exclude from arbitration matters involving the entire collective bargaining unit, as distinguished from the individuals comprising it, because Section 16.5 of the contract between Interscience and the Union specifically excludes from arbitration such matters as:

"(1) the amendment or modification of the terms and provisions of this agreement;

(2) salary or minimum wage rates as set forth herein;
[fol. 64]

(3) matters not covered by this agreement; and

(4) any dispute arising out of any question pertaining to the renewal or extension of this agreement."

But even if it be said that each individual employee thus affected had a grievance for which the Union under the contract was designated as his negotiating agent, the procedures set up by the contract for the resolution of those individual grievances were completely ignored and constituted "an abandonment of the grievance".

While negotiations were had for some time prior to June 27, 1961 between the business agent of the Union and the attorney for Interscience, after the public announcement in late May or early June 1961 of the proposed consolidation of Interscience and John Wiley & Sons, Inc., into Wiley, and counsel for the Union as early as June 27, 1961 advised Interscience by letter that "any impairment of the rights of the employees will be resisted to the fullest possible extent under the law", the Union failed to avail itself of the procedures under the contract which were a condition precedent to arbitration. It had the entire period from late May, when first public announcement was made of the proposed consolidation, at least until August 11, 1961 when Interscience and John Wiley & Sons, Inc. agreed to consolidate into Wiley, and possibly until October 2, 1961 when the certificate of consolidation of Wiley was actually filed in

the Secretary of State's office, to initiate individual grievance machinery under the contract.

Had it done so it probably would have resolved prior to the actual consolidation the issues which it now seeks to resolve by arbitration because the agreement of August 11, 1961 between Interscience and John Wiley & Sons, Inc. to consolidate into Wiley provides in Paragraph VIII thereof as follows:

> [fol. 65] "Anything herein or elsewhere to the contrary notwithstanding this agreement may be terminated and abandoned prior to the effective date of consolidation if:
>
> (a) In the judgment of the board of directors of either of the corporations, any material litigation shall be pending or threatened against or affecting either of the corporations, or any of their respective assets, or the merger and consolidation, which renders it inadvisable to proceed with the merger and consolidation; * * *"

Whether the contract of February 1, 1960 contemplated that the "Grievances: Adjustments of Disputes: Arbitration" procedures of Article XVI applied to the situation herein presented, or was intended to cover any grievances between individual employees and Interscience or both, the failure of the Union to avail itself of the procedures delineated in the contract constituted an abandonment of the grievance, individual or collective, pursuant to Sections 16.0 and 16.6 of the agreement.

Accordingly, the Union's motion that Wiley be compelled to submit to arbitration with it on the aforesaid issues is denied.

It is so ordered; no further order is necessary.

Sidney Sugarman, United States District Judge.

Dated: New York, New York, March 29, 1962

[fol. 66]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF CHARLES H. LIEB, IN OPPOSITION TO MOTION—February 21, 1962

State of New York,
County of New York,
Southern District of New York, ss.:

Charles H. Lieb, being duly sworn, deposes and says:

I am an Attorney-at-law, admitted to practice in this Court, and am a member of the law firm of Paskus, Gordon & Hyman, Attorneys for the Respondent John Wiley & Sons, Inc. ("Wiley"). I make this affidavit in opposition to the Petition of District 65, Wholesale and Retail Department Store Union AFL-CIO (the "Union"), to require Wiley to submit certain questions to arbitration.

Prior to its merger into Wiley, my firm represented Interscience Publishers, Inc. ("Interscience"). Since the merger, we have represented Wiley.

In late May or early June, 1961, there was a public announcement of the proposed merger of Interscience into Wiley. Some time thereafter and prior to June 27, 1961, Mr. Turbane, the Business Agent of the Union, told me that the Union employees in Interscience were concerned that they might lose their jobs as a result of the proposed merger. I told Mr. Turbane that the merger would not be consummated prior to October and I assured him that I would give him advance notice of the actual date.

[fol. 67] Thereafter, I received a letter dated June 27, 1961 from Irving Rozen, a member of the law firm which represents the Union (Respdt.'s Exh. "3"), as follows:

"Dear Mr. Lieb:

District 65 has consulted us with respect to how the proposed 'joining forces' with House of John Wiley & Sons, Inc. by Interscience Publishers Inc. would affect the rights of their employees, members of Dis-

trict 65, and without limitation, their right to continued employment. While we do not have all the facts with respect to the 'joinder' of forces, according to their own announcement 'the publication and the distribution of our (Interscience) books' is to continue. We have come to the opinion that, under the agreement between the parties, our employees are entitled to continue working notwithstanding such joinder, and we call upon you to advise your client to see to it that the employees are not terminated from employment. Of course, any impairment of the rights of the employees will be resisted to the fullest possible extent under the law."

I did not answer the letter but in mid-September, 1961, I called Mr. Rozen and arranged to meet with him and with Mr. Turbane on Tuesday, September 19th. We met, as arranged. I told them that the merger would become effective two weeks hence, on Monday morning, October 2nd. I said that Wiley was a much larger Company than Interscience, that it did a much larger business, and had a much larger staff. I said that although the physical transfer from the Interscience to the Wiley premises would not be made until later in the year, it was Wiley's position that on October 2, when the merger became effective, the collective bargaining unit theretofore existing at Interscience would disappear and be merged into and be absorbed by the larger Wiley [fol. 68] unit which was not represented by the Union, or for that matter, by any other union.

They expressed the view that the Union should continue to represent the Interscience employees after the merger and until the expiration of the contract on January 31, 1962. I denied this and said that under no circumstances would Wiley recognize the Union as the bargaining agent for any of its employees unless so ordered by the National Labor Relations Board, and I offered our cooperation if the Union should decide to petition for an election.

Specifically, I made the following points:

1. that the 40 Interscience employees then represented by the Union would on October 2, 1961 become Wiley em-

ployees and members of a larger bargaining unit not represented by the Union;

2. that from and after October 2, 1961 Wiley would regard the Interscience contract with the Union as ineffective and would not recognize the Union as the bargaining agent for the former Interscience employees;

3. that from and after October 2, 1961 Wiley would make no further contributions to the District 65 Security Plan and the District 65 Security Plan Pension Fund except to make final settlement of the liability of Interscience for the calendar quarter ended September 30, 1961. Further, that when final payment was made, credit would be taken for the deposit which Interscience had made with the Security Plan and which, under the contract, was to be returned to Interscience on the termination of the contract; and

4. that all Interscience employees who became Wiley employees as a result of the merger would become eligible for qualification under the Wiley Employees Retirement Plan. In this connection I explained to them that the qualifications for entry into the Plan were the attainment of age 25 and three years of service with Wiley, and that the Plan [fol. 69] would be amended to provide that service with Interscience would be considered the same as service with Wiley.

I said that some jobs might be lost as a result of the combination of operations; that in my opinion the contract made no provision for severance payments under such circumstances, but that the Company would voluntarily make such payments in the amounts determined by the contract formula provided it received general releases from the employees in question.

Mr. Turbane and Mr. Rozen expressed the hope that no jobs would be lost, and said that they would inform the Union officers and the Interscience Union employees of Wiley's position and of its offer to make voluntary severance payments to those for whom no jobs might be available. I am advised that a shop meeting was called either that evening (September 19th) or on the following day, and

that a full disclosure was made by Mr. Turbane of the substance of our conversation as related above.

On September 21, 1961, at Mr. Rozen's request, I read Respondent's Exhibit "5" to him over the telephone, and on the following day it was delivered to all Interscience employees.

I had another meeting on September 26, 1961 with Mr. Turbane and with Mr. Cleveland Robinson, Secretary of the Union. At that meeting, Mr. Robinson and Mr. Turbane suggested an increase in the formula for the severance payments to be made to those whose jobs might be lost as a result of the merger. They also suggested that payments determined in the same manner be made to employees who might resign their employment with Wiley within a period of 30 days following their transfer from the Interscience premises to the Wiley premises. I tentatively agreed to each of these proposals and they said that they would have another meeting with the shop.

On September 28, 1961, Mr. Robinson called me on the telephone. He said that he had met with the shop and with [fol. 70] other Union officers. He expressed no objection to Wiley's announced intention to consider the contract ineffective and to refuse to recognize the Union as the bargaining agent for the former Interscience employees on and after October 2, 1961. He said that the proposed severance payments were also agreeable. He requested, however, that the Interscience Union employees who entered Wiley employment should do so with their seniority rights vested in them.

I replied that seniority is a relative matter; that it defines the status of one employee in relation to other employees; that it would not be possible to afford seniority to the 40 Interscience employees then represented by the Union without establishing seniority for the other 40 Interscience employees and 300 Wiley employees; that Wiley had no seniority policy and did not plan to establish one; and that the proposal was unworkable, and, in any event, entirely unacceptable. I added that if the request was not withdrawn, Wiley would not consider itself bound by its offer to make severance payments.

Mr. Robinson was insistent. So was I. I said that there was no room for further conversation unless the Union withdrew its request. He said that the Union had instructed its lawyer to look into the matter. That was the end of the conversation, and the last conversation with Union representatives prior to the merger.

Four additional meetings were had with the Union after the merger. They took place between November 6, 1961 and January 4, 1962, and were without prejudice to Wiley's refusal to recognize the Union as the bargaining agent for any of its employees and its refusal to recognize the contract as effective on and after October 2, 1961. At the last of these meetings, I said that Wiley had found that it would not be necessary to terminate any jobs as a result of the combination of operations.

Charles H. Lieb

(Sworn to on February 21st, 1962.)

[fol. 71]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF AL TURBANE, IN SUPPORT OF MOTION—March 5, 1962

State of New York,
County of New York, ss.:

Al Turbane, being duly sworn, deposes and says:

1. I am an Organizer employed by District 65, RWDSU, AFL-CIO, the plaintiff herein, and I have had charge of its labor relations with Interscience Publishers, Inc. for the past five years.

2. I participated in the meetings with Messrs. Lieb and Lobdell, referred to in their affidavits sworn to on February 21, 1962, and those at which the employees considered the situation with their employer-Company, John Wiley & Sons, Inc.

3. The fact is that throughout the six or more meetings which were held with representatives of the defendant Company, we, at all times, insisted upon recognition of the Union contract and that the rights of the employees be fully protected as they had accrued and become vested under the Union contract. This was made clear by the very first letter that our counsel addressed to the defendant's counsel (Respondent's Exhibit "3"), wherein, among other things, we stated

> "• • • • Of course, any impairment of the rights of the employees will be resisted to the fullest possible extent under the law."

[fol. 72] 4. Although the letter referred to above was mailed out on June 27, 1961, the Company did not deign to reply in any manner whatsoever until mid-September of 1961 when Mr. Lieb arranged for the conference of September 19. At that meeting, again our counsel and I informed Mr. Lieb that the Union took the position that the Union should continue to represent the employees even after the merger, and that the rights of the employees continue unaffected by the merger. Indeed, this is conceded by Mr. Lieb when he says, at page 3 of his affidavit of February 21, 1962, that

> "They [myself and my counsel] expressed the view that the Union should continue to represent the Interscience employees after the merger and until the expiration of the contract on January 31, 1962."

Our counsel called Mr. Lieb's attention to the recent decisions which had sustained the rights of employees notwithstanding removal of the plant or termination of the contract. We discussed seniority rights and severance pay as well, and Mr. Lieb made a certain offer. At that meeting we attempted to ascertain the names of the employees whom the defendant would not continue under employment, but Mr. Lieb refused to make such a disclosure.

5. I was present also at the meeting which took place between Mr. Lieb and Mr. Robinson on September 26, 1961,

where we restated our position on Union recognition and the continuation of the contract. We asked for coverage of the Interscience employees only, with the same rights they had had theretofore. Mr. Lieb refused to grant such requests and we probed the possibility of a settlement with severance pay for those who would not be continued in Wiley's employ. At that meeting Mr. Lieb told us that he thought that about 25% of the employees would not be continued.

6. I was present in Mr. Robinson's office during part of the time that he talked on the telephone to Mr. Lieb on Sep- [fol. 73] tember 28, 1961. I heard him restate our position as to Union recognition and representation by the Union of the Interscience employees, including the right of the employees to have the grievance machinery set forth in the contract. While he did not specifically state during that talk that

> "I object to Wiley's announced intention to consider the contract ineffective."

(as set forth in substance at page 6 of Mr. Lieb's affidavit), he certainly did, by every utterance and every argument indicate that he strongly objected to Wiley's position that the contract was ineffective.

In settlement negotiations he did probe for severance pay and other bases upon which a compromise could be effectuated, but he never retreated from his position that Interscience and Wiley were wholly in the wrong—morally and legally—in attempting to cut off the contract and to cut off the employees' rights thereunder. Indeed, at this stage of the settlement negotiations it would have been most ill-advised on the part of Mr. Robinson, a seasoned Union negotiator, to have taken any other view; and this is the view that he maintained—that I maintain—and that our counsel (and later on, Mr. Livingston) maintained throughout the negotiations.

Mr. Cleveland Robinson is Secretary-Treasurer of the Union; he is the third highest man in the echelon of union officerships; and he was well able to negotiate and certainly

did not, nor could he ever have surrendered the Union's position and rights in the matter.

The best evidence of Mr. Robinson's views are, as a matter of fact, contained in Mr. Lieb's affidavit where he states —that which is a fact—that Mr. Robinson in that telephone conversation of September 28, 1961 insisted on seniority rights to Interscience employees (again, page 6 of Mr. Lieb's affidavit). Mr. Robinson was "insistent" (page 6 as above), even at the risk of upsetting all the negotiations for [fol. 74] a settlement. Mr. Lieb then stated that he was going to Europe and would not return for some time, but that at such time we could resume discussions for a compromise of the situation.

7. Additional four meetings were had between Mr. Lieb, Mr. Lobdell, Mr. Robinson, myself, and my counsel, and two of these were also attended by Mr. David Livingston, the President of the Union. At all of these meetings Mr. Livingston specifically insisted upon the continuation of the contract, upon seniority rights and grievance machinery, and upon the other rights of the employees. As a result of these conferences the Company finally yielded to the extent that it agreed to continue all the employees in their jobs—but as is set forth in the Company's affidavits, it specifically stated through Mr. Lieb at these meetings—that it would never recognize the Union or the contract or any of the rights of the employees thereunder. As a matter of fact, time and again, Mr. Lieb would state that any communication that he was having or holding with the Union or any of its representatives was not to be deemed in any wise a recognition of Union rights or authority.

This is not the case of one Company taking over another Company without knowledge of the latter company's union contracts. Mr. Lobdell, at page 3 of his affidavit, concedes that "Wiley was aware of Interscience's contract with the Union." Of course, the fact that Wiley acted on advice, which the Union disagrees with, can in no wise be deemed to prejudice the rights of its employees (cf. page 3, Lobdell's affidavit).

8. I want to make it absolutely clear, contrary to the impression sought to be given throughout the Company's

affidavits, that the employees were not, and are not satisfied with the disposition of their problems as effectuated by the Company. For example (passing over for the moment, the impropriety of the Company in obtaining information as to [fol. 75] what took place at a Union meeting), the fact is that at the October 4, 1961 meeting, the employees were very unhappy with the Company's attitude and proposals. I was present and chaired the meeting and I communicated the Company's proposals to the employees. Considerable discussion resulted on the part of the membership. At that time we were trying to work out a settlement with the Company and we wanted to get authority from the employees to continue with our negotiations and the employees did vote to authorize us to continue such negotiations. But there was no definite acceptance of a definite or firm offer. Indeed there could not have been, because, only a few days prior—September 28th—without intervening meetings or conversation between the Company and the Union, Mr. Robinson had been insistent upon getting certain points, which the Company was equally insistent upon not giving (page 6 of Mr. Lieb's affidavit). Moreover, the fact is too, that we held at least four additional meetings with the Company after this particular Union meeting, and at these four additional meetings the Union, as collective bargaining representative of the employees, made it amply clear to the Company that the proposals of the Company were wholly unsatisfactory.

Mr. Lobdell is leaning on a very weak reed indeed when he states that the Company's proposal

> "• • • was obviously satisfactory to the Union because on October 9, one week after the merger, Wiley made a final Union Security Plan payment which was accepted by the Union in full settlement of Interscience's obligation under the contract." (page 4 of Mr. Lobdell's affidavit)

A glance at the Company's Exhibit 10A and B, will show that no such conclusion is possible; that the payment to the Union Security Plan was "final payment from July 1, 1961 to September 31, 1961." There was nothing in the trans-

[fol. 76] mittal letter or the check which in any wise indicated that it was in "full settlement"!

9. Mr. Lobdell's affidavit seeks to give the impression that "employees had voluntarily resigned" and that each of the continuing employees is "satisfied with his job and the terms of his employment."

The facts are quite the opposite. There were no "voluntary resignations." The employees of Interscience went over to Wiley with the hope of continuing their employment. They had invested many years of their lives in Interscience's employ and had obtained many vested property rights. They were hopeful that these rights could be maintained and protected to them, and that Wiley would prove a good salvage of the situation that had developed. Each of the eleven employees who resigned did so because the jobs were not of the same character, responsibility or physical working conditions. The employees are not people of financial means and their property rights in their jobs are, of course, of the greatest importance to them and to their families. When the eleven resigned they did so because they just could not continue to work under the adverse conditions imposed upon them at Wiley * * * conditions that were inferior in many respects. One of the chief differences was that of status and importance. Here the work for the most part was routine, did not offer the same challenge or intellectual response enjoyed while at Interscience, and the employees were made to feel menial. Some of the employees tendered their resignations because they could no longer see a career ahead of them such as had been open to them at Interscience. They were given no opportunity to demonstrate their intellectual attainments in some instances and in other instances menial tasks were assigned to them markedly below their accustomed status and position in the Company. Such belittling of ability in the work relationship could only result in one thing—and that is that the employee must quit!

[fol. 77] In other instances the physical conditions surrounding the work were actually improper and here I refer to the poor lighting, improper heating of the room, etc., which made it quite impossible from the employees' stand-

point. As the employees had no grievance machinery or other representation for presenting their views to management, they had no alternative therefore but to resign.

The employees have raised the issues with me and with the Union as to seniority, job security, grievance procedures, severance pay, vacation pay; and pension, medical, disability and health insurance payments. They are most concerned about these matters and it is because of these issues that the Union has not been able to settle the controversy with the Company. If it be true that the employees themselves have not raised these issues with the Company, then it is because they are aware of the Union's current difficulties with the Company and the Company's reactions thereto. If the employees have not raised these issues with the Company it is because they are fearful that on so doing it would affect their standing in their jobs with the Company. Unprotected as the employees are by any Union, their fear is understandable. This in itself demonstrates beyond the possibility of a doubt, the need for a Union and the need for grievance machinery and the value of a collective bargaining agreement. The employees are not *satisfied* with their jobs or the terms of their employment, but under the economic realities of existence in society they have no alternative but to make the best of things. The attempts of these employees to salvage whatever they can out of a difficult situation should be recognized—in no wise should they be deemed approval or acquiescence in the Company's position or procedures.

10. It is an uncontradicted fact, and it must remain uncontradicted, that there was no acceptance either informally or formally by either the employees or the Union of the Company's proposals or of its position or of its procedures. The negotiations throughout were, as Mr. Lieb himself put it,

> [fol. 78] " • • • without prejudice to Wiley's refusal to recognize the Union as the bargaining agent for any of its employees and its refusal to recognize the contract as effective on and after October 2, 1961." (at page 7 of Mr. Lieb's affidavit)

These very statements in Mr. Lieb's affidavit show beyond doubt that throughout the Union was insisting on recognition and the continuation of the contract, but that the Company was adamantly opposed and insisted that any discussions be without prejudice to its position.

Any action that Wiley took was entirely unilateral. If Wiley for example, incurred an obligation of funding the past services of Interscience's employees for pension benefits and did this "in part on reliance upon the acceptance of the employees", it did so unilaterally and can point to no document or statement which justified its "reliance".

As a matter of fact this is the first time that I have heard about this funding cost and I am sure none of the employees has any knowledge whatsoever on this subject. Obviously, the defendant's counsel, if he had any real "reliance", it would have been reduced to some writing or document.

This "reliance" demonstrates the utter invalidity of the defendant's entire case.

11. While no formal demand for arbitration was made by the Union, from the very first letter written by our counsel on June 27, 1961, down to the very last conference held on or about January 4, 1962, we consistently made it clear to the Company that we would do everything within our power to protect the employees' rights. We specifically told the Company and its representative time and again, that unless we could work out a settlement of our controversy we would have to go to arbitration or litigation or take appropriate steps to enforce compliance with the contract. It comes with exceedingly ill grace on the part of the Company [fol. 79] to take the position of alleged lack of compliance by the Union with the grievance machinery of the contract. We had at least six meetings; engaged in a great deal of correspondence, and held several telephone conversations—all dealing with this subject, and the Company of course, was fully aware of the issues involved. At no time did the Company ask for or seek any other grievance procedures. Now, it is wholly improper for it to raise this question of alleged technical noncompliance by the Union. And as a matter of fact, it was the Company which initiated the grievance procedures followed in this case because it was

Mr. Lieb, who in mid-September of 1961 called our counsel on the telephone and arranged for the first conference of September 19th (page 2 of Mr. Lieb's affidavit).

Mr. Lobdell is Vice-President and Treasurer of defendant and he was present at at least two of the conferences with our Union President, Mr. Livingston, and he was made fully aware of the issues and problems. Hence, if there be any impropriety in the Union procedures, it must be held that the Company had waived them and consented to a substitution of the procedures that were followed. The Company is now estopped from insisting on the alleged conditions precedent to the contract. It is also true that the grievance machinery was never intended to take care of a situation of this nature where a whole Company itself is affected and where every job in the Company is involved. A reading of the grievance machinery clauses will show that they were intended only to apply to the small grievance affecting a single employee.

12. The affidavits of Messrs. Lobdell and Lieb show on their face that from the very first meeting on September 19, 1961, it would have been utterly useless and futile for the Union to have attempted to comply with any grievance machinery clauses. Messrs. Lobdell and Lieb tell us time and again through their affidavits referred to hereinabove, that [fol. 80] the Company would never under any circumstances yield to the Union on these issues. Mr. Lieb—in his conversations—told us that throughout their meetings, while the Company might give a little more in severance pay or might take an extra employee into the Wiley company, the defendant *never never "in a million years"* would agree to any disposition which would continue the rights of the employees or would it recognize the Union or the contract.

Thus, it seems that the Company tells us in one breath—through the authorized affidavits—that at no time since October 2, 1961, has it recognized the Union; and in almost the very same breath the Company complains that the Union is not carrying on as it should. This is inconsistent and shows that there is no validity to the Company's entire position.

We feel there is no reason why the Wiley company cannot recognize the Union inasmuch as it has no Union of its

own which might take an adverse position (see page 8 of Mr. Lobdell's affidavit).

13. Inasmuch as certain stipulations entered into between the parties may have some bearing upon the plaintiff's motion, I attach hereto and make a part of this affidavit, copies of such stipulations which are dated January 26, 1962 and February 8, 1962 respectively. These stipulations of adjournment were entered into at the request of the defendant.

Al Turbane

(Sworn to before me this 5th day of March, 1962.)

[fol. 81]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNDERTAKING FOR COSTS—April 17, 1962

Whereas, an order was entered in the above entitled action on the 29th of March, 1962 in the District Court of the United States for the Southern District of New York; and

Whereas, the Appellant, David Livingston as President of District #65, Retail, Wholesale & Department Store Union, AFL-CIO, feeling aggrieved thereby has prosecuted his appeal to the United States Circuit Court of Appeals for the Second Circuit.

Now, Therefore, United States Fidelity and Guaranty Company, having an office and usual place of business at No. 100 Maiden Lane, City of New York, County and State of New York, hereby undertakes in the sum of Two Hundred Fifty and 00/100 ($250.00) Dollars, that if the judgment or order so appealed from is affirmed or the appeal is dismissed, the Appellant, David Livingston, as President, etc., shall pay all costs awarded against him on said appeal, or such costs as the Appellate Court may award if the judgment or order be modified, the total liability of the surety

under this undertaking shall not exceed Two Hundred Fifty & 00/100 ($250.00) Dollars.

Dated, New York, April 17, 1962

United States Fidelity and Guaranty Company, By Clifford B. Ellin, Attorney-in-fact.

[fol. 82]

In United States District Court for the Southern District of New York

62 Civ. 378

In the Matter of David Livingston, as President of District 65, Retail, Wholesale & Department Store Union, AFL-CIO, Plaintiff;

against

John Wiley & Sons, Inc., Defendant.

Notice of Appeal—Filed April 18, 1962

Sirs:

Notice is hereby given that David Livingston, as President of District 65, RWDSU, AFL-CIO, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit, from the order of Honorable Sidney Sugarman, United States District Judge, entered in this proceeding on March 29, 1962 and contained in the Court's Opinion on said date, which order denies the plaintiff's motion to compel the defendant to submit to arbitration; and plaintiff hereby appeals from each and every part of said order.

Dated: New York, New York, April 18, 1962

Weisman, Allan, Spett & Sheinberg, Attorneys for Plaintiff, 1501 Broadway, New York 36, New York.

To:

Paskus, Gordon & Hyman, Esqs., Attorneys for Defendant, 733 Third Avenue, New York 17, New York.

[fol. 83] [File endorsement omitted]

In United States Court of Appeals

For the Second Circuit

In the Matter of David Livingston as President of District 65, Retail, Wholesale & Department Store Union, AFL-CIO, Plaintiff-Appellant,

—against—

John Wiley & Sons, Inc., Defendant-Appellee.

Appendix to Brief for Defendant-Appellee—Filed September 28, 1962

Paskus, Gordon & Hyman, Attorneys for Defendant-Appellee, 733 Third Avenue, New York 17, New York; Charles H. Lieb, Robert H. Bloom, Of Counsel.

[fol. 85]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Index No. 378/1962

In the Matter of DAVID LIVINGSTON, as President of District 65, Retail, Wholesale & Department Store Union, AFL-CIO, Plaintiff,

—against—

JOHN WILEY & SONS, INC., Defendant.

AFFIDAVIT OF FRANCIS LOBDELL, IN OPPOSITION TO MOTION—February 21, 1962

State of New York,
County of New York,
Southern District of New York, ss.:

Francis Lobdell, being duly sworn, deposes and says:

I am Vice President and Treasurer of John Wiley & Sons, Inc. ("Wiley") a New York corporation, which has its principal office and place of business at 440 Park Avenue South, New York, New York. I submit this affidavit in opposition to the Petition herein.

Service of the Petition and order to show cause was accepted by Wiley's counsel on January 25, 1962. Service of the complaint which is incorporated by reference in the Petition was made on Wiley on January 29, 1962. The time to answer or otherwise move with respect to the complaint has been extended by stipulation of the parties until a final order is entered in these proceedings.

[fol. 86] The Petition is brought to compel Wiley to proceed to arbitration with the Petitioner (the "Union") under the arbitration clause (Article XVI) of a collective bargaining agreement, Petitioner's Exh. "1," (the "contract") made by the Union with Interscience Publishers, Inc. ("Interscience"). The contract was made in 1960 and by its

terms expired on January 31, 1962. Interscience was a New York corporation, having its office at 250 Fifth Avenue, New York, New York, and on October 2, 1961 was merged into Wiley.

The issues on which arbitration is sought are stated as follows:

(a) Whether the seniority rights built up by the Interscience employees must be accorded to said employees now and after January 30, 1962;

(b) Whether, as part of the wage structure of the employees, the Company is under an obligation to continue to make contributions to District 65 Security Plan and District 65 Security Plan Pension Fund now and after January 30, 1962;

(c) Whether the job security and grievance provisions of the contract between the parties shall continue in full force and effect;

(d) Whether the Company must obligate itself to continue liable now and after January 30, 1962 as to severance pay under the contract; and

(e) Whether the Company must obligate itself to continue liable now and after January 30, 1962 for vacation pay under the contract.

[fol. 87] The Petition assumes that the Court has jurisdiction under the United States Arbitration Act, Title 9, U. S. C. I am advised by counsel that the Court lacks jurisdiction under that Act and, therefore, that the Petition should be dismissed.

Apart from the jurisdictional question, however, the Petition is without merit and should be summarily denied.

Wiley has no contract with the Union requiring it to submit to arbitration or to recognize any other obligation in favor of the Union, nor has it ever entered into or established any collective bargaining relation with the Union. When Wiley agreed to merge Interscience into Wiley, it was aware of Interscience's contract with the Union. It was advised and believed that at the time of

merger, the collective bargaining unit of 40 persons represented by the Union would be absorbed into the larger Wiley unit of about 380, which was not and is not represented by any Union; that the Union would then become *functus officio* and the contract ineffective, and that if the Union had a contrary view, its remedy would be to apply to the National Labor Relations Board for clarification and relief.

Steps were taken with great care to give the Union advance notice of the merger date and of the Company's view of the effect that the merger would have on the contract. As appears from the chronological summary which follows, the Union knew in June, 1961 that the Companies would merge. Two weeks before the merger was actually accomplished the Union was put on notice that on and after the merger date, Wiley would not recognize the Union or consider itself bound by the contract. On September 28, the Thursday before the merger, a registered letter was sent to [fol. 88] the Union reaffirming that fact. On the following Monday, October 2, another letter to the Union confirmed that the merger had taken place and that Wiley would not recognize the Union or give any effect to the contract it had made with Interscience. This was satisfactory to the employees, for (I have been told) two days later, on October 4, there was a meeting at which by an overwhelming vote of those present, the change in status was approved. And it was obviously satisfactory to the Union because on October 9, one week after the merger, Wiley made a final Union Security Plan payment which was accepted by the Union in full settlement of Interscience's obligation under the contract.

It should be noted, too, that the Union has never made the slightest pretense at compliance with the contract procedures for arbitration.

With great detail the contract outlines "the sole means of obtaining adjustment" (Article XVI).

"Step 1" requires a conference between "the affected employee" and representatives of the Union and the Company. If the grievance is not settled in two days, it is to be reduced to writing and signed by the Employer and "the affected employee."

"Step 2" requires a further conference between the Union and Company within 5 days after the preparation of the written statement prescribed in Step 1.

If the grievance has not been resolved, "Step 3" requires its submission to arbitration before an arbitrator chosen by mutual consent. The submission to arbitration must occur within two weeks of the "inception" of the grievance, unless the time is extended in writing. If the parties fail to agree upon an arbitrator, he shall be selected by the [fol. 89] filing of "a demand for arbitration by the aggrieved party" with the American Arbitration Association.

A grievance must be filed "with the Employer and the Union Shop Steward" within four weeks after its occurrence or latest existence, and a failure to file the grievance "within this time limitation" shall be deemed "an abandonment of the grievance." Under the most generous interpretation of the time limits established by the contract, the "grievance" should have been filed not later than four weeks after the merger, or October 30, and the demand to choose a mutually agreeable arbitrator should have been made within two weeks thereafter. None of these steps has been taken and any "grievance" that may have arisen as a result of the merger has, by mandate of the contract, been "abandoned".

There were 40 Interscience employees represented by the Union. Eleven have voluntarily resigned, delivering general releases to the Company at the time. The remaining twenty-nine continue in Wiley's employ. No one has been discharged or laid-off. No one has been disciplined or has asserted a grievance. No one has raised any issue with respect to seniority, job security, grievance procedures, severance pay, vacation pay, or pension, medical, disability or health insurance payments, as those terms were used in the contract. To the best of my knowledge, each of them is satisfied with his job and his terms of employment.

The following is a summary of the relevant facts:

1. The contract in suit, made in 1960 and expiring on January 31, 1962, is the last of a series of collective bargaining contracts made by Interscience with the Union or its predecessor. Separate contracts were made in 1949, 1951,

1953, 1954, 1956, 1958 and in 1960. The 1953, 1954, 1956, [fol. 90] 1958 and the 1960 contracts follow the same general pattern and are basically different from the earlier contracts. A copy of the 1951 contract is marked Respondent's Exh. "1"* for comparison with the 1960 contract.

2. October 2, 1961. Interscience was merged into Wiley, with Wiley continuing as the surviving Company. Copies of the merger agreement and Certificate of Consolidation are marked Respondent's Exhs. "2A" and "2B." Each was engaged in business as a publisher of scientific books.

Interscience was organized in 1940, it occupied about 5,500 square feet of space at 250 Fifth Avenue, and had approximately 80 employees, 40 of whom were clerical and shipping employees represented by the Union.

Wiley was organized in 1904, succeeding to a business originally established in New York in 1807. It occupies more than five floors at 440 and 432 Park Avenue South, having in all approximately 44,000 square feet. It also leases 70,000 square feet of warehouse space in the Starrett Lehigh Building on West 26th Street in New York City, and is building an office and warehouse in Salt Lake City, Utah, which will have approximately 20,000 square feet.

Just prior to the merger, Wiley had about 300 employees, none of whom was represented by a union. Wiley employees have never been represented by a union and there is no established Wiley policy with respect to "seniority rights," "job security," "grievance procedures" or "severance pay," as those terms are used in the Petition.

3. May and June, 1961. As appears from the annexed affidavit of Mr. Lieb verified February 21, 1962, the Union [fol. 91] and the Interscience employees whom it represented had ample prior notice of the merger. On July 27, 1961, Mr. Rozen, Union counsel, addressed Respondent's Exh. "3" to Mr. Lieb, insisting that the Interscience employees be continued in their jobs notwithstanding the merger. I am advised that on the same day, members of the Union Shop Committee met with Mr. Mosbacher, an Inter-

* This and all other Respondent's Exhibits are incorporated herein by reference and will be submitted herewith.

science Vice President, and expressed uneasiness over the pending merger. They were told that Mr. Turbane, who was then and is now the Union's business agent, should feel free to fully discuss the matter with Mr. Lieb.

4. September 19, 1961. Mr. Lieb had the meeting with Mr. Turbane and Mr. Rozen which is described in his affidavit. At that meeting, he told them that the merger would become effective at the opening of business on October 2, 1961, and that at that time Wiley would regard the Interscience contract with the Union as ineffective and would not recognize the Union as the bargaining agent for the former Interscience employees.

5. September 21, 1961. Interscience wrote to its employees that the merger with Wiley would become effective on Monday, October 2, 1961, and that on that day they would become Wiley employees. A copy of that letter is marked Respondent's Exh. "5."

6. September 28, 1961. Mr. Lieb had a second meeting with the Union representatives, as described in his affidavit.

7. September 28, 1961. Interscience sent a registered letter to the Union repeating that the collective bargaining agreement would not be recognized on and after October [fol. 92] 2, 1961 except for the obligation to pay to the "65 Security Plan" the amount due for the quarter ended September 30, 1961. That letter, marked Respondent's Exh. "6," follows:

"Gentlemen:

The merger of Interscience Publishers, Inc. into John Wiley & Sons, Inc. with Wiley remaining as the surviving corporation becomes effective on October 2, 1961 at 9:00 a.m. At that time our employees become Wiley employees and our collective bargaining agreement with you will no longer be effective except for the obligation to pay to the '65 Security Plan' the amount due for the quarter ended September 30, 1961. In due course the report for that period and the supplemental W-2 forms will be sent to you with payment

for the difference between the amount shown to be due and the deposit which you are now holding for Interscience's account."

8. October 2, 1961, the effective date of the merger Wiley delivered two letters to the former Interscience employees. Respondent's Exh. "7" is a letter of welcome addressed to all. It follows:

"Dear Fellow Employee:

Welcome to John Wiley & Sons, Inc. I am glad that you have joined us to put together two good companies into a new organization which I am confident will be recognized as the strongest and best in its field. As a Wiley employee you will share on an equal footing with all other Wiley employees in the various benefits which the company supplies. The attached summary, and the supplemental material will acquaint you with these benefits. Read the material carefully and if not entirely clear on [fol. 93] every point be sure to ask your supervisor for further explanation.

Your attention is specifically invited to our Employees Retirement Plan. Please note that three years of service and age twenty five are required for membership. The pension trust has been amended so that your *service* with Interscience will be deemed to be service with Wiley.

Wiley has been a publisher continuously since 1807. It could not have grown and prospered as it has except through the services of satisfied and happy employees. This is now your company and I am confident that you will also be satisfied and happy here."

The other, Respondent's Exh. "8," was delivered only to those former Interscience employees who had been represented by the Union. It follows:

"Dear Fellow Employee:

Until today, as an employee of Interscience Publishers, Inc. you were represented for collective bar-

gaining purposes by District 65. By virtue of the merger between Interscience Publishers, Inc. and John Wiley & Sons, Inc. which took place today, Interscience has disappeared as a legal entity and Wiley remains as the surviving corporation. You are now a Wiley employee doing similar work as part of a larger group which is not represented by District 65. Effect therefore will not be given to the collective bargaining contract which existed between Interscience and District 65."

On the same day, Wiley sent a registered letter to the Union, Respondent's Exh. "9," as follows:

"Gentlemen:

The merger of Interscience Publishers, Inc. into John Wiley & Sons, Inc. became effective at 9:00 a.m. [fol. 94] today. You were recognized by Interscience Publishers, Inc. as the collective bargaining agent for its clerical and shipping employees. These employees are now Wiley employees and are a minority accretion to an identical unit of Wiley employees for which you are not the chosen collective bargaining agent.

For your information we enclose a copy of a letter which has this day been delivered to the former employees of Interscience Publishers, Inc., whom you represented before the merger."

The copy of the letter enclosed therewith was Wiley's letter to the former Union employees, Respondent's Exh. "8," above quoted.

No reply has ever been received to any of the above-mentioned letters.

9. October 4, 1961. I have been advised that on this day a meeting took place of the Interscience employees formerly represented by the Union. At that meeting, the vote was 20 to 2 in favor of accepting the change in status effected by the merger and to accept the Company offer of severance pay for those who would lose their jobs as

a result of the combination of Interscience and Wiley operations.

10. October 9, 1961. The Company made the final Union Security Plan payment due from it under Section 15.1 of the contract. In its letter of October 9, 1961, marked Respondent's Exh. "10," the Company wrote:

"Gentlemen:

We are enclosing our check in the amount of $684.06 in payment of the following:

[fol. 95]

1. Amount due to the "65 Security Plan" for the quarter ended September 30, 1961	$4,184.06
2. Less: Deposit which you are now holding for Interscience's account	3,500.00
Check enclosed	$ 684.06

The supplemental W-2 forms will be sent to you shortly."

The check enclosed therewith was endorsed "• • • Final Payment from July 1, 1961 to September 31, 1961," and was deposited by the 65 Security Plan on October 13, 1961 (Respondent's Exhs. "10A," "10B").

11. Miscellaneous. Wiley's Board of Directors on October 2, 1961 adopted resolutions amending the Wiley Employees Retirement Plan to include the former employees of Interscience and to give them credit for their past service with Interscience. Copies of these resolutions are marked Respondent's Exh. "11."

On November 3, 1961, a certified copy of the resolutions was forwarded to the Internal Revenue Service, Pension Trust Group, New York City, in order that the Plan, as amended, would remain qualified under the applicable provisions of the Internal Revenue Code. A copy of the forwarding letter is marked Respondent's Exh. "12," and a copy of the reply from the Internal Revenue Service, advising of the approval of the changes is marked Respondent's Exh. "13."

The cost to Wiley of funding the past service of all Interscience employees who entered Wiley's employ is $62,370. Wiley incurred this obligation at least in part in reliance upon the acceptance by the employees formerly [fol. 96] represented by the Union of the benefits offered them under the Wiley Retirement Plan in place of the benefits formerly accruing under the District 65 Security Plan and Pension Fund.

A letter of November 24, 1961 was received from the Union addressed to Interscience, stating the Union's desire to make certain changes in its contract (Exh. "14" attached hereto). I believe that this is a form letter sent as a matter of routine to all companies with whom the Union has a collective bargaining agreement. On December 4, 1961 a reply was sent by Company counsel, calling the Union's attention to the fact that Interscience had been merged with Wiley, and that personnel formerly in the employ of Interscience were now Wiley employees and, therefore, that the Union's letter was moot (Respondent's Exh. "15.").

Another form letter, dated December 1, 1961, was received from the Union addressed to Interscience (Exh. "16" attached hereto), and to this letter Company counsel likewise replied in the same vein (Respondent's Exh. "17" attached hereto).

12. At no time since October 2, 1961, the effective date of the merger, has Wiley recognized the Union as the collective bargaining agent for any of the Company's employees, and at no time has it recognized any rights or privileges which the Union or the members of the former Shop Committee, or the former Shop Steward, had enjoyed under the Union contract with Interscience.

[fol. 97] 13. No demand was made by the Union for arbitration prior to the service of the moving papers in this proceeding.

The Petition should be dismissed.

Francis Lobdell

(Sworn to on the 21st day of February, 1962.)

[fol. 98]

EXHIBIT 14 TO AFFIDAVIT

Letterhead of

District 65 Retail, Wholesale and Department Store Union
A.F.L.-C.I.O.

November 24, 1961

REGISTERED RETURN
RECEIPT REQUESTED

Interscience Publishers, Inc.
250-5th Ave.
New York, N. Y.

Gentlemen:

In accordance with the provisions of our agreement, we are hereby notifying you of our desire to make certain changes in our contract.

Please inform us as to a convenient date to arrange a discussion for this purpose.

Very truly yours,

CLEVELAND ROBINSON
Secretary-Treasurer

[fol. 99]

EXHIBIT 15 TO AFFIDAVIT

Letterhead of

Paskus, Gordon & Hyman

December 4, 1961

District 65
Retail, Wholesale and Department Store Union
13 Astor Place
New York 3, N. Y.

Gentlemen:

We refer to your registered letter of November 24, 1961, addressed to Interscience Publishers, Inc. at 250

Fifth Avenue, New York City, in which you state that "In accordance with the provisions of our agreement, we are hereby notifying you of our desire to make certain changes in our contract". You have previously been advised that Interscience Publishers, Inc. has been merged into John Wiley & Sons, Inc. and that personnel formerly in the employ of Interscience Publishers, Inc. are now Wiley employees. Your letter therefore, under the circumstances, appears to be moot.

Very truly yours,

CHARLES H. LIEB

CHL:hc

[fol. 100]

EXHIBIT 16 TO AFFIDAVIT

Letterhead of

District 65 Retail, Wholesale and Department Store Union A.F.L.-C.I.O.

December 1, 1961

Interscience Pub. Inc.
250 Fifth Avenue
New York City

Gentlemen:

The collective bargaining agreement in effect between us expires on February 1, 1962.

Over the past number of years, we have had a number of unfortunate situations resulting from failure to complete negotiations for a new contract by the expiration date. On the one hand, our members have failed to secure the prompt benefits of new terms and conditions, and on the other, employers have been subjected to protracted periods of unrest and tension.

The General Council of our Union, therefore, has adopted a policy to the effect that all work will cease in every shop

where a contract has not been renewed, effective as of the date of expiration.

We are confident that you will agree with us that it is to our mutual advantage to immediately begin negotiations [fol. 101] so that difficulties can be avoided. We, therefore, urge you to make arrangements to meet with appropriate committees of your employees and designated union representatives, to begin negotiations immediately.

Very truly yours,

CLEVELAND ROBINSON
Cleveland Robinson
Secretary-Treasurer

CR/b

[fol. 102]

EXHIBIT 17 TO AFFIDAVIT

Letterhead of

Paskus, Gordon & Hyman

December 5, 1961

District 65
Retail, Wholesale and Department Store Union
13 Astor Place
New York 3, N. Y.

Gentlemen:

We have your letter of December 1, 1961 addressed to Interscience Publishers, Inc. It appears to have been written under the same misapprehension that was evident in your earlier letter of November 24, 1961 to Interscience Publishers, Inc., and our reply thereto of December 4 covers the situation.

Very truly yours,

CHARLES H. LIEB

CHL:hc

[fol. 103]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In the Matter of DAVID LIVINGSTON, as President of District 65, Retail, Wholesale & Department Store Union, AFL-CIO, Plaintiff,

—against—

JOHN WILEY & SONS, INC., Defendant.

AFFIDAVIT OF CHARLES H. LIEB, IN OPPOSITION TO MOTION—March 6, 1962.

State of New York,
County of New York,
Southern District of New York, ss.:

Charles H. Lieb, being duly sworn, deposes and says:

I request permission to submit this affidavit in connection with certain statements made by Al Turbane in his affidavit sworn to March 5, 1962, which was served on my office late yesterday afternoon and which has just come to my attention.

Most of the statements in the affidavit are argumentative. A few, however, require comment.

1. Mr. Turbane says that the Wiley employees who formerly were represented by the Union "were not and are not satisfied". (p. 5, p. 7). To the best of my knowledge, no such dissatisfaction has been indicated to any of their superiors in the Wiley organization and it is significant [fol. 104] that Mr. Turbane does not state the names of the employees who feel aggrieved.

2. On page 7, Mr. Turbane refers to the eleven employees who have resigned their jobs with Wiley. He implies that these eleven employees have grievances to be processed. He neglects to say that at the time of resignation, each of the employees executed and delivered a

general release in favor of Interscience and Wiley receiving in exchange therefor a substantial terminal payment voluntarily made by the Company.

3. On page 9 of his affidavit, Mr. Turbane makes the statement that the action taken by Wiley in bringing the former Interscience employees into the Wiley Employees' Retirement Plan "was entirely unilateral". He overlooks that in Interscience's letters of September 21 and September 28, 1961 (Respondent's Exhs. 5, 6) and in Wiley's letters of October 2, 1961 (Respondent's Exhs. 7, 8, 9), it was clearly stated that the employees entering Wiley's employment as a result of the merger would be covered under the Wiley plan (with credit for past service) and not under the Union's plan. The actual cost to Wiley of funding past service with Interscience for the employees formerly represented by the Union was, I am informed, $18,462.00.

Charles H. Lieb

(Sworn to on the 6th day of March, 1962.)

[fol. 105]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 101—October Term, 1962

Argued November 5, 1962

Docket No. 27629

In the Matter of DAVID LIVINGSTON, as President of District 65, Retail, Wholesale and Department Store Union, AFL-CIO, Plaintiff-Appellant,

v.

JOHN WILEY & SONS, INC., Defendant-Appellee.

Before: MEDINA, SMITH and KAUFMAN, Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Sidney Sugarman, Judge.

District 65, Retail, Wholesale and Department Store Union, AFL-CIO appeals from an order denying its motion to compel arbitration pursuant to the terms of a collective bargaining agreement. Opinion below reported at 203 F. Supp. 171. Reversed.

Irving Rozen, New York, N. Y. (Myron Nadler and Weisman, Allan, Spett & Sheinberg, New York, N. Y., on the brief) for plaintiff-appellant.

[fol. 106] Charles H. Lieb, New York, N. Y. (Robert H. Bloom and Paskus, Gordon & Hyman, New York, N. Y., on the brief), for defendant-appellee.

OPINION—January 11, 1963

MEDINA, Circuit Judge:

District 65, Retail, Wholesale and Department Store Union, AFL-CIO appeals from an order of the District

Court for the Southern District of New York denying its motion to compel arbitration under a collective bargaining agreement. The opinion below is reported at 203 F. Supp. 171.

Beginning in 1949 the Union entered into collective bargaining agreements with Interscience Publishers, Inc., the last one dated February 1, 1960, for a term of two years ending January 31, 1962. None of these agreements was stated in terms to be binding on Interscience "and its successors." On October 2, 1961 Interscience effected a consolidation for bona fide business reasons with another publishing firm, John Wiley & Sons, Inc. A dispute arose with respect to the effect of the consolidation on the status of the collective bargaining contract and the Union. Interscience before the consolidation, and Wiley thereafter took the position that the agreement was automatically terminated for all purposes by the consolidation, and that all rights of the Union and the employees arising out of the agreement were at an end. The Union adhered throughout the discussions and correspondence both before and after the consolidation to the view that the agreement was not terminated by the consolidation and that certain rights had become "vested" which Wiley must recognize. The details of this controversy will be more fully described shortly. The upshot was that the Union demanded arbitra- [fol. 107] tration of the dispute, under Article XVI of the Agreement (set forth in full in the Appendix to this opinion), relating to "Grievances: Adjustment of Disputes: Arbitration," and on January 23, 1962, the Union commenced this action against Wiley to compel arbitration. The District Court assumed that the agreement survived the consolidation, but denied arbitration on two grounds: that the agreement should be so construed as "to exclude from arbitration matters involving the entire collective bargaining unit, as distinguished from the individuals comprising it"; and that, even if not so limited, the Union has failed to avail itself of the grievance procedure described in the agreement and had thus abandoned any rights it might have had to arbitration of the dispute.

We think it clear that the District Court had jurisdiction of the case under Section 301 of the Labor Management

Relations Act, 29 U. S. C. Section 185, and that the appeal by the Union is properly before us. *Textile Workers Union* v. *Lincoln Mills*, 1957, 353 U. S. 448; *General Electric Co.* v. *Local 205, United Electrical Workers*, 1957, 353 U. S. 547; *Goodall-Sanford, Inc.* v. *United Textile Workers, AFL Local 1802*, 1957, 353 U. S. 550. We also hold, as matter of federal law, (1) that the agreement and rights arising therefrom were not necessarily terminated by the consolidation, and that Wiley and the Union are proper parties to the arbitration proceeding; (2) that the terms of the agreement contemplated the arbitration of just such a dispute or controversy as the one before us and that the attempt to arbitrate here is not an improper effort to secure status as collective bargaining agent for the negotiation of a new contract, nor is it an attempt to secure allegedly proscribed "quasi-legislative" arbitration; (3) that issues raised by Wiley arising out of the Union's alleged failure to comply with certain requirements of the agreement relative to so-called grievance procedure are matters to be decided by the arbitrator.

[fol. 108] The facts, sketched above, may be stated more fully as follows:

On October 2, 1961 Interscience employed 80 persons, of whom 40 were covered by the 1960 contract; Wiley employed 300 persons. Interscience, with a single plant in New York City, did an annual business of $1,000,000; Wiley, an older company, had three substantially larger plants, and did an annual business of $9,000,000.

The Union learned of the proposed consolidation in June of 1961 and on June 27 wrote Interscience, stating its position that the contract would remain in force notwithstanding the consolidation. On September 19, 1961 Interscience initiated conversations with the Union, in the course of which Interscience insisted that the contract would end upon consolidation. On September 21, 1961 Interscience wrote its employees, stating its views on termination and offering jobs at the Wiley plant in New York City. On October 2, 1961, the effective date of the consolidation, Wiley wrote the Union stating that the contract was terminated.

All of Interscience's 80 employees were subsequently employed by Wiley, but 11 later resigned and received severance pay voluntarily granted by Wiley. The Union does not allege discrimination against these persons, but attributes their resignation to worsened working conditions. Wiley has placed the Interscience employees under its own pension plan, crediting them for past service with Interscience, but it does not recognize their seniority or other rights under the Interscience contract, nor does it recognize the appellant Union or any other union.

The Interscience contract obliged Interscience to make quarterly payments into an employee pension fund. The Union contends that Interscience's payment for the third quarter of 1961 was inadequate, and that Wiley is obliged and has failed to make up this deficit and also to make the [fol. 109] payment due for the fourth quarter. The total claim amounts to $8,000. The contract also contains provisions according to the Interscience employees rights regarding seniority, job security, grievance procedure, and vacation and severance pay.

On January 23, 1962 the Union commenced this action in the District Court to compel Wiley to arbitrate the dispute between the parties concerning the effect of the consolidation upon the contract and the so-called "vested" rights of the Union and the employees to continued payments by Wiley to the Interscience employee pension fund and to seniority, job security, grievance procedure, and vacation and severance pay, "now and after January 30, 1962."

I

The question of "substantive arbitrability" is for the court not for the arbitrator to decide. *Atkinson* v. *Sinclair Refining Co.*, 1962, 370 U. S. 238, 241. The controlling law is not New York law but federal law. *Textile Workers Union* v. *Lincoln Mills, supra* at 456. The sources of that law, to be fashioned by judicial inventiveness, are the express provisions of the national labor laws, the basic policies underlying these laws, "state law, if compatible with the purpose of Section 301" and which "will best effectuate the federal policy," and accepted principles of

traditional contract law. *Id.* at 457; *Local 174, Teamsters Union* v. *Lucas Flour Co.*, 1962, 369 U. S. 95, 105. See Jay, *Arbitration and the Federal Common Law of Collective Bargaining Agreements*, 37 N. Y. U. L. Rev. 448 (May, 1962); Comment, *The Emergent Federal Common Law of Labor Contracts: A Survey of The Law under Section 301*, 28 Univ. Chi. L. Rev. 707 (1961).

[fol. 110] The Union tells us that under Section 90 of the New York Stock Corporation Law[1] the contract did not automatically terminate because the provisions of this statute are to the effect that the consolidated corporation is "deemed to have assumed" and "shall be liable" for "all liabilities and obligations" of the constituent corporation just as if it "had itself incurred such liabilities or obligations." But this legislation is clearly not binding upon us, and we may or may not find that the rule thus formulated, with or without qualifications or in some modified form, "will best effectuate the federal policy." We have found no case formulating a rule of federal law on the point at issue here, and none has been called to our attention. We must accordingly, to the best of our competence, and giving due weight to the legislation of the Congress

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[1] *Rights of creditors of consolidated corporations.*

The rights of creditors of any constituent corporation shall not in any manner be impaired, nor shall any liability or obligation due or to become due, or any claim or demand for any cause existing against any such corporation or against any stockholder thereof be released or impaired by any such consolidation; but such consolidated corporation shall be deemed to have assumed and shall be liable for all liabilities and obligations of each of the corporations consolidated in the same manner as if such consolidated corporation had itself incurred such liabilities or obligations. The stockholders of the respective constituent corporations shall continue subject to all the liabilities, claims and demands existing against them as such, at or before the consolidation; and no action or proceeding then pending before any court or tribunal in which any constituent corporation is a party, or in which any such stockholder is a party, shall abate or be discontinued by reason of such consolidation, but may be prosecuted to final judgment, as though no consolidation had been entered into; or such consolidated corporation may be substituted as a party in place of any constituent corporation, by order of the court in which such action or proceeding may be pending.

in the area of labor-management relations and other sources relevant to the task, including the provisions of Section 90 of the New York Stock Corporation Law, fashion for the first time the rule of federal law that is to govern the decision of the first and preliminary question presented [fol. 111] for our consideration: Did the consolidation abruptly terminate the collective bargaining agreement and the rights of the Union and the employees created or arising thereunder?

We think it clear and we decide and hold that the federal policy of promoting industrial peace and stability, especially with reference to arbitration procedures set up in collective bargaining agreements (*Textile Workers Union* v. *Lincoln Mills, supra* at 453-4; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 1960, 363 U. S. 574, 578; *Local 174, Teamsters Union* v. *Lucas Flour Co., supra* at 105; *Drake Bakeries Inc.* v. *Local 50*, 1962, 370 U. S. 254, 263) can be fostered and sustained only by answering this question in the negative. And we reach this conclusion despite the fact that the agreement contains no statement that its terms are to be binding upon Interscience "and its successors", and the further fact that neither of the parties had a possible consolidation in mind when the terms of the agreement were negotiated and settled. Not only would a contrary rule involve manifest injustice, a circumstance not to be lightly disregarded or brushed aside; it would be a breeder of discontent and unharmonious relations between employer and employees, and a source of unnecessary and disrupting litigation.

A further principle, particularly applicable in the formulation of new segments of federal labor law, is, we think, the principle of restraint that requires us to formulate the rule that is decisive of the case before us, and to go no further.

Thus, while we do hold that the consolidation did not *ipso facto* terminate all rights of the Union and the employees created by or arising out of the collective bargaining agreement,[2] we do not decide what those rights are.

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[2] As this action was commenced prior to January 31, 1962, the termination date of the agreement, our decision is entirely con-

[fol. 112] As will appear in a later portion of this opinion, the power and function of making a decision, or a series of decisions, with respect to these rights, have been reserved by the parties for the arbitrator in the course of the arbitration proceedings that will follow our reversal of the order appealed from. *Cf. Goodall-Sanford, Inc.* v. *United Textile Workers, AFL Local 1802*, 1 Cir., 1956, 233 F. 2d 104, 110, affirmed, 1957, 353 U. S. 550. Our decision, then, cannot be construed as holding generally that collective bargaining agreements survive consolidation. We merely hold that, as we interpret the collective bargaining agreement before us in the light of Supreme Court decisions enunciating the federal policy of promoting industrial peace and stability, especially with reference to arbitration procedures set up in collective bargaining agreement, we cannot say that it was intended that this consolidation should preclude this Union from proceeding to arbitration to determine the effect of the consolidation on the contract and on the rights of the employees arising under the contract.

Several additional objections to arbitration have been made on the ground of improper parties. Wiley contends that it cannot be made a party to the arbitration proceeding because it was not a party to the agreement and the arbitration clause was not binding upon it. We think that our discussion above disposes of this objection as well. When negotiating and before effectuating the consolidation of October 2, 1961, Wiley was aware of the existence of the collective bargaining agreement and of its obligations under the New York Stock Corporation Law Section 90. In view of the national policy of promoting industrial peace and stability and the special function of arbitration in promoting these ends, above adverted to, we think and hold, in the exercise of our duty to fashion an appropriate [fol. 113] rule of federal labor law, that it is not too much to expect and require that this employer proceed to arbi-

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sistent with *Procter & Gamble Independent Union* v. *Procter & Gamble Mfg. Co.*, 2 Cir., filed December 10, 1962, where we held that grievances arising after the expiration of a collective bargaining agreement are not arbitrable.

tration with the representatives of the Union to determine whether the obligation to arbitrate regarding the substantive terms of the contract survived the consolidation on October 2, 1961, and, if so, just what employee rights, if any, survived the consolidation.[3]

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[3] The National Labor Relations Board has specifically recognized that the rule (see *N. L. R. B.* v. *Aluminum Tabular Corp.*, 2 Cir., 1962, 299 F. 2d 595, 598) that a successor employer will not be required to continue to bargain with a union when there has been a substantial change in the nature of the employment enterprise, does not control the issue, presented in the instant case, of the binding character and meaning of contractual rights under a preexisting agreement. *Cruse Motors, Inc.*, 1953, 105 N. L. R. B. 242, 248. This is because of the inapplicability of the rationale of the rule, which is that certification "is an official pronouncement by the Board that a majority of the employees in a given work unit desire that a particular organization represent them in their dealings with their employer," and that where there has been a substantial change in the nature of the employment enterprise "there may well be a consequent change in the nature of the work required of the employees resulting in differences in their working condition problems. Thus the employees may feel that they can be better served by another employee organization." *N. L. R. B.* v. *Armato*, 7 Cir., 1952, 199 F. 2d 801, 803. See also *N. L. R. B.* v. *Lunder Shoe Corp.*, 1 Cir., 1954, 211 F. 2d 284, 286.

Similarly inapplicable are cases holding that an existing agreement will not bar a Representation petition under Section 9(c) of the Labor Management Relations Act when there has been a substantial change in the nature of the employment enterprise. The rationale of these cases, inapplicable here, is that "sound and stable labor relations will best be served by allowing the employees in the reconstituted units to determine for themselves the labor organization which they now desire to represent them." *L. B. Spear & Co.*, 1953, 106 N. L. R. B. 687, 689. Cases involving enforcement of previously obtained orders of the National Labor Relations Board against a successor employer, which may or may not be favorable to Wiley's position (see Annot., 46 A. L. R. 2d 592, 1956), are also without significant effect here because of the specific limitations imposed in those cases by Rule 65(d) of the Federal Rules of Civil Procedure (*Regal Knitwear Co.* v. *N. L. R. B.*, 1945, 324 U. S. 9, 13-14) and the public policy that one should "not be adjudged [guilty] of wrongdoing * * * without complaint, notice, full opportunity to present [one's] * * * defenses and the other essential requirements of due process of law." *N. L. R. B.* v. *Birdsall-Stockdale Motor Co.*, 10 Cir., 1953, 208 F. 2d 234, 237.

(*footnote continued*)

[fol. 114] Wiley also argues that the Union is not the proper party to present the claims of these employees. But the fact that the contract has now terminated does not itself bar arbitration. *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 1960, 363 U. S. 593. There is no showing that the Union here has been decertified. *Glendale Mfg. Co.* v. *Garment Workers, Local 520*, 4 Cir., 1960, 283 F. 2d 936, cert. denied, 1961, 366 U. S. 950; *Modine Mfg. Co.* v. *Machinists*, 6 Cir., 1954, 216 F. 2d 326. There is here no rival union, whose rights would be interfered with by the Union's pressing of these employee claims. *Kenin* v. *Warner Bros. Pictures, Inc.*, S. D. N. Y., 1960, 188 F. Supp. 690. In short, there is no showing that the freedom of choice of any employee would in any way be infringed by the Union's pressing of the employee claims under a preexisting agreement, and we are aware of no reason why the Union may not enforce arbitration of a dispute or controversy concerning rights alleged to have arisen out of and pursuant to the terms of the collective bargaining agreement which it negotiated, especially where there appears to be no other person or entity in a position legally to enforce arbitration.

II

The issues tendered by the Union for arbitration are:

(a) Whether the seniority rights built up by the Interscience employees must be accorded to said employees now and after January 30, 1962;

[fol. 115] (b) Whether, as part of the wage structure of the employees, the Company [Wiley] is under an obligation to continue to make contributions to District

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Livingston v. *Gindoff Textile Corp.*, S. D. N. Y., 1961, 191 F. Supp. 135, cited by Wiley, is also without application since the original employer there underwent a complete dissolution, rather than a consolidation, and was found to have no legal or substantial factual relationship with the successor employer. Nor was such a showing made in *Office Employees International Union, Local 153, AFL-CIO* v. *Ward-Garcia Corp.*, S. D. N. Y. 1961, 190 F. Supp. 448.

65 Security Plan and District 65 Security Plan Pension Fund now and after January 30, 1962;

(c) Whether the job security and grievance provisions of the contract between the parties shall continue in full force and effect;

(d) Whether the Company [Wiley] must obligate itself to continue liable now and after January 30, 1962 as to severance pay under the contract;

(e) Whether the Company [Wiley] must obligate itself to continue liable now and after January 30, 1962 for vacation pay under the contract.

In its brief and on oral argument the Union characterized the rights claimed by it on behalf of itself and the employees it represents as "property rights" or "vested rights" built up by the employees "during their long years of employment" in accordance with the terms of the collective bargaining agreement.[4] Hence the essence of the proposed

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[4] In *Goodall-Sanford, Inc.* v. *United Textile Workers, AFL Local 1802, supra*, at 110, the First Circuit recognized that:

"Even without an express reference to that possibility in the contract, in view of the increasingly complex use of compensation in the form of 'fringe benefits,' some types of which inherently are not payable until a time subsequent to the work which earned the benefits, we believe that there may be terms within a union-employer contract whose effect is not necessarily limited to the continuance of the living relationship that exists while the business is being operated as a going concern."

The possibility of such "vested" rights has been recognized specifically with respect to vacation and severance pay [*In re Wil-Low Cafeterias*, 2 Cir., 1940, 111 F. 2d 429, 432; *Botany Mills, Inc.* v. *Textile Workers Union of America, AFL-CIO*, 50 N. J. Super. 18, 141 A. 2d 107 (1958); *In re Potoker*, 286 App. Div. 733, 146 N. Y. S. 2d 616 (1st Dep't., 1955), affirmed *sub nom. Potoker* v. *Brooklyn Eagle, Inc.*, 2 N. Y. 2d 553, 161 N. Y. S. 2d 609, 141 N. E. 2d 841 (1957)]; seniority rights [*Zdanok* v. *Glidden*, 2 Cir., 1961, 288 F. 2d 99]; and pension plan rights [*New York City Omnibus Corp.* v. *Quill*, 189 Misc. 892, 894-6, 73 N. Y. S. 2d 289, 291-3 (Sup. Ct. 1947), modified on other grounds, 272 App. Div. 1015, 79 N. Y. S. 2d 925 (1st Dep't., 1947), affirmed, 297 N. Y. 832, 78 N. E. 2d 859 (1948); *Roddy* v. *Valentine*, 268 N. Y. 228,

[fol. 116] submission is that the arbitrator determine the nature of and proper remedy for implementing those rights, if any, as to seniority, pension plan, job security, grievance procedure, and vacation and severance pay, which he finds accrued during the term of the collective bargaining agreement. In other words, implicit in the submission is the possibility that the arbitrator may decide that no rights to seniority, pension plan, job security, grievance procedure, or vacation and severance pay, survived the consolidation or the date of expiration of the collective bargaining agreement. It is not our function to express any opinion on the subject, provided the agreement contemplates that such a question or congeries of questions was to be decided by arbitration. *United Steelworkers of America* v. *American Mfg. Co.*, 1960, 363 U. S. 564, 567-9.[3]

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197 N. E. 260 (1934)). Cases holding that no such rights in fact exist, such as *Oddie* v. *Ross Gear & Tool Co.*, 6 Cir., 1962, 305 F. 2d 143, 150, recognize that the matter is solely one of the "construction of the agreement." See Note, *Termination of Collective Bargaining Agreements—Survival of Earned Rights*, 54 Nw. U. L. Rev. 646, 651 (1959).

[3] We realize that there may be serious difficulties in giving to the Interscience employees special treatment in preference to the Wiley employees of long standing. Perhaps the arbitrator can work out some fair lump sum settlement which would avoid later friction. Be that as it may, the very fact that in the instant case we are presented with such difficult issues in a new and important field as yet largely unexplored, is ample reason why we must, as we do, leave the merits to the arbitrator whose creative role in the interpretation of collective bargaining agreements has been well remarked upon. *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, *supra* at 578-81; Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1490-93 (1959).

Of course, if the arbitrator in deciding the merits should purport to establish and enforce rights accruing subsequent to the termination of the agreement, or if, although purporting to define and implement rights accruing under the contract although maturing thereafter, he should make an award which is completely without root and foundation in the collective bargaining agreement itself, we have no doubt that the courts would have no choice but to refuse enforcement of the award. The Supreme Court has clearly stated, *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, *supra* at 597:

[fol. 117] We may note that it is just because the Union seeks to arbitrate the existence and nature of rights which it claims "vested" during the term of the agreement, although maturing after the termination thereof, that arbitration here does not conflict with the rule above discussed, that a successor employer will not be required to continue to bargain with a union when there has been a substantial change in the nature of the employment enterprise. So, too, it is because of this claim of "vested rights" that our order of arbitration does not conflict with decisions, whose validity we need not pass upon, barring "quasi-legislative" [fol. 118] arbitration. See *Boston Printing Pressman's Union* v. *Potter Press*, D. Mass., 1956, 141 F. Supp. 553, affirmed, 1 Cir., 1957, 241 F. 2d 787, cert. denied, 355 U. S. 817; *Couch* v. *Prescolite Mfg. Corp.*, W. D. Ark., 1961, 191 F. Supp. 737; *In re Valencia Bait Express, Inc.*, D. P. R., 1961, 199 F. Supp. 103.

"When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of the problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance in many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

Appealing as it is, we cannot yield to the suggestion that we should now enunciate those standards which should guide the arbitrator in his determination of the existence, nature and remedy for implementing any employee rights accruing under and surviving the expiration of the collective bargaining agreement, so that he will know definitely whether any award he may make will "draw its essence from the collective bargaining agreement." To do this would be to intrude in a domain not ours and to invert the whole order of procedure in this delicate field of labor relations.

A careful scrutiny of the agreement discloses, we think, a perfectly clear intention that the questions propounded by the Union be arbitrated. A distinction is made, on the very face of the agreement, between ordinary grievances personal to individual employees, on the one hand, and other, perhaps more important disputes, such as the one before us, relative to "matters affecting the entire bargaining unit," both of which, however, are subjected to arbitration. Read as a whole the agreement clearly contemplates the arbitration of any "difference" or "dispute" between the Union and the employer "arising out of or relating to this agreement, or its interpretation or application, or enforcement." Arbitration is not limited to "grievances." This language, quoted from Section 16.0 of Article XVI, relating to "Grievances: Adjustments of Disputes: Arbitration," is plainly intended to be broad and comprehensive. And we must remember the teaching of *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, *supra* at 584-5, that the dispute is to be arbitrated unless it is perfectly clear that it is specifically and plainly excluded. The party claiming exclusion has a heavy burden. See *Procter & Gamble Independent Union* v. *Procter & Gamble Mfg. Co.*, 2 Cir., 1962, 298 F. 2d 644.

The exclusion clause relied upon here is Section 16.5(3) referring to "matters not covered by this agreement." Wiley would have us hold that, because the agreement does not mention the possibility of consolidation, the "matter" in suit is not covered by the agreement. This is pure sophistry. This suit involves the Union's claim of rights [fol. 119] to pension plan, seniority, vacation and severance pay and other matters that are covered by specific provisions of the agreement, and even if such claim is wrong or even untenable and frivolous, this does not bar arbitration. *United Steelworkers of America* v. *American Mfg. Co.*, *supra* at 568-9. Moreover, the various specific references to matters reserved for the sole control of the employer and resting in his discretion, contained elsewhere in the agreement, merely emphasize the fact that no such specific exclusionary clauses make reference to any privilege on the part of the employer to consolidate with another com-

pany and cut off rights allegedly "vested" in the employees, such as the right to payments to the welfare fund, to vacations, and to seniority. It is not probable that the Union would have agreed to any such exclusionary clause had the subject come up for discussion.

A further argument in support of the interpretation of the agreement given above is that as arbitration is described as "the sole and exclusive" remedy of the parties and the employees, "in lieu of any and all remedies, forums at law, in equity or otherwise," "for any claimed violations of this contract, and for any and all acts or omissions claimed to have been committed by either party during the term of this agreement" (Section 16.9), it is not reasonable to suppose that it was intended that the Union should have no right whatever to resort to arbitration in the event of a consolidation, but should be entirely at the mercy of the employer.

III

While the Supreme Court has clearly held that the question of "substantive arbitrability" is for the court (*Atkinson* v. *Sinclair Refining Co., supra* at 241), it has never expressly decided the question as to "procedural [fol. 120] arbitrability," namely, whether or not adherence or lack of adherence to the grievance and arbitration procedure outlined in a collective bargaining agreement is for decision by the court or by the arbitrator. Nor do we discern such a ruling by implication in the fact, adverted to by Wiley, that one week after deciding the *Steelworkers* cases the Court denied certiorari in *Brass & Copper Workers* v. *American Brass Co.*, 7 Cir., 1959, 272 F. 2d 849, cert. denied, 1960, 363 U. S. 845, a case in which the Seventh Circuit had held that the question is for the court. So far as other authority is concerned, this Circuit has never spoken clearly on the issue, and there appears to be a difference of opinion on this point in the other Circuits, with more recent decisions holding that the question is for the arbitrator.[6] The

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[6] *Boston Mutual Life Insurance Co.* v. *Insurance Agents International*, 1 Cir., 1958, 258 F. 2d 516 (court function); *Brass & Copper Workers* v. *American Brass Co., supra* (court function);

lower federal courts seem also to be split,[7] and the com- [fol. 121] mentators in general agree that the matter is for the arbitrator.[8]

This question of "procedural arbitrability" is squarely before us now. By way of preliminary we must, we think, take note of the fact that "substantive arbitrability" and "procedural arbitrability" are separate and distinct matters. The Supreme Court has explained the rule that "substantive arbitrability" is for the court in the following terms:

> "The Congress • • • has by § 301 of the Labor Management Relations Act, assigned the courts the

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Radio Corp. of America v. *Association of Professional Engineering Personnel*, 3 Cir., 1961, 291 F. 2d 105 (arbitrator function); *International Association of Machinists* v. *Hayes Corp.*, 5 Cir., 1961, 296 F. 2d 238 (citing cases which hold that it is the arbitrator's function).

[7] Arbitrator's function: *Philadelphia Dress Joint Board* v. *Sidele Fashions, Inc.*, E. D. Pa., 1960, 187 F. Supp. 97; *Local 971, United Automobile Workers AFL-CIO* v. *Bendix-Westinghouse Automotive Brake Co.*, N. D. Ohio, 1960, 188 F. Supp. 842; *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, W. D. Pa., 1959, 188 F. Supp. 225, affirmed, 3 Cir., 1960, 283 F. 2d 93; *United Cement Workers International Union, AFL-CIO* v. *Allentown-Portland Cement Co.*, E. D. Pa., 1958, 163 F. Supp. 816; *Insurance Agents International Union, AFL* v. *Prudential Ins. Co.*, E. D. Pa., 1954, 122 F. Supp. 869 (purporting to apply state law).

Court function: *Truck Drivers* v. *Grosshans & Petersen*, D. Kan., 1962, 51 L. R. R. M. 2116; *General Tire & Rubber Co.* v. *Local 512, United Rubber Workers of America, AFL-CIO*, D. R. I., 1961, 191 F. Supp. 911, affirmed, 1 Cir., 1961, 294 F. 2d 957; *United Brick & Clay Workers* v. *Gladding, McBean & Co.*, S. D. Calif., 1961, 192 F. Supp. 64; *Brass & Copper Workers Co.* v. *American Brass Co.*, E. D. Wis., 1959, 172 F. Supp. 465, affirmed, 7 Cir., 272 F. 2d 849, cert. denied, 1960, 363 U. S. 845; *International Union of Operating Engineers* v. *Monsanto Chemical Co.*, W. D. Ark., 1958, 164 F. Supp. 406.

[8] Cox, *supra* at 1509-12; Gregory, *The Law of the Collective Agreement*, 57 Mich. L. Rev. 635, 646-9 (1959); *Procedural Requirements of a Grievance Arbitration Clause: Another Question of Arbitrability*, 70 Yale L. J. 611 (1961). Contra: 28 Univ. Chi. L. Rev., *supra* at 732.

duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to arbitrate."

United Steelworkers of America v. Warrior & Gulf Co., supra at 582; *Atkinson* v. *Sinclair Refining Co., supra,* at 241. However, as Professor Cox has correctly noted in his article in 72 Harvard Law Review, *supra* at 1511, "the reason for giving the court power to decide what subject matter is within the arbitration clause does not extend" to the issue of "procedural arbitrability", for the court's duty to determine "whether the reluctant party has breached his promise to arbitrate" is exhausted once it has been determined that "the party seeking arbitration is making a claim which on its face is governed by the contract" or that "the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made." *United Steelworkers* [fol. 122] *of America* v. *American Mfg. Co., supra* at 568; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co., supra* at 582. See *Philadelphia Dress Joint Board* v. *Sidele Fashions, Inc.,* E. D. Pa., 1960, 187 F. Supp. 97, 100.

Thus the settled law on the issue of "substantive arbitrability" does not control the decision of the separate problem now under discussion, and we think there is ample reason for holding that issues of compliance with grievance and arbitration procedure in the ordinary collective bargaining agreement are properly within the competence of the arbitrator. We find wholly unpersuasive the argument that questions of procedure in collective bargaining agreements involve "largely a matter of contract construction" as to which "the industrial context is irrelevant" and that consequently "the courts' expertise in construing agreements seems to qualify them as the appropriate forum for determining procedural compliance." 28 Univ. Chi. L. Rev., *supra* at 732. Rather we believe that a holding that this Court or any court should decide the merits of a dispute concerning procedural questions under an arbi-

tration clause of a collective bargaining agreement would be quite inconsistent with the principles and policies enunciated by the Supreme Court to the effect that once it has been determined that the reluctant party has breached his promise to arbitrate, the matter must go to the arbitrator for determination on the merits. *United Steelworkers of America* v. *American Mfg. Co., supra* at 568; *United Steelworkers of America* v. *Warrior & Gulf Co., supra* at 581-2; *United Steelworkers of America* v. *Enterprise Wheel & Car Corp., supra* at 596.

What is fundamental to the teaching of these cases, as we read them, is the ruling that the parties have bargained for a decision by an arbitrator because they [fol. 123] thus have the benefit of his creativity and expertise that are in no small measure due to his knowledge of and familiarity with the industry and shop practices constituting the environment in which the terms of collective bargaining agreement were negotiated and assented to. Surely, and especially under the conditions of the industrial world of today, this environment, and the concrete day-by-day relationships to which the agreement must be applied, includes the implementation of the arbitration clause and its procedural aspects. See *Procedural Requirements of a Grievance Arbitration Clause: Another Question of Arbitrability*, 70 Yale L. J. 611, 618 (1961); Cox, *supra* at 1509-12; Gregory, *The Law of the Collective Agreement*, 57 Mich. L. Rev. 635, 646-9 (1959). *Cf.* Fleming, *Problems of Procedural Regularity in Labor Arbitration*, 1961 Wash. U. L. Q. 221. Indeed, it may well be that the arbitrator can make his most important contribution to industrial peace by a fair, impartial and well-informed decision of these very procedural matters. To hold matters of procedure to be beyond the competence of the arbitrator to decide, would, we think, rob the parties of the advantages they have bargained for, that is to say, the determination of the issues between them by an arbitrator and not by a court. A contrary decision would emasculate the arbitration provisions of the contract.

The position just above outlined seems to us to be the only sound position to take, especially when we consider what are the particular procedural questions involved in

this case. Accordingly, we shall summarize, as briefly as we can, the miscellaneous contentions of Wiley that are supposed to fall in the category of procedure and the way these contentions are dealt with by the Union. Thus Wiley claims the Union was required to follow Steps 1, 2 and 3, described in Section 16.0. The Union replies that these [fol. 124] applied only to an "affected employee," and not to the controversy in this case which affects the entire bargaining unit. The Union also points to the fact that there was an orderly exchange of views, and says this surely was a substantial compliance with the contract. *Cf. International Association of Machinists* v. *Hayes Corp.*, 5 Cir., 1961, 296 F. 2d 238. With respect to Wiley's claim that there was a failure to comply with the requirement of Section 16.6 that "any grievance must be filed with the Employer and with the Union Shop Steward within four (4) days after its occurrence or latest existence," the Union replies that the question here is not a "grievance" but a "dispute" or "difference" arising out of the agreement and that this Section has no application to a dispute over such a broad question as to whether all the employees had "vested" rights under the contract inextinguishable by unilateral action by the employer; and that to say this is a "grievance" to be filed "with the Employer and with the Union Shop Steward" borders on absurdity. Moreover, the Union contends that, if some sort of notice of the dispute was required within four weeks after its "occurrence or latest existence," the letter of June 27, 1961, filed within four weeks after the Union learned of the proposed consolidation, was such notice. It is further argued by the Union that the dispute was plainly a continuing one. But the Union adds that even if all its contentions as above stated were to be rejected, there was a clear waiver of procedural requirements by Wiley.

Is it to be supposed that the benefits of arbitration, duly bargained for, are to be indefinitely postponed, just because one of the parties tenders a miscellany of such contentions as these, and argues that no arbitration can be had until after a court has rejected them and they have also been passed upon by this Court?

[fol. 125] It is of the essence of arbitration that it be speedy and that the source of friction between the parties be promptly eliminated. *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 2 Cir., 1959, 271 F. 2d 402, 410, cert. granted, 1960, 362 U. S. 909, dismissed per stipulation, 364 U. S. 801. The numerous cases involving a great variety of procedural niceties already cited in the footnotes to this opinion make it abundantly clear that, were we to decide that procedural questions under an arbitration clause of a collective bargaining agreement are for the court, we would open the door wide to all sorts of technical obstructionism. This would be completely at odds with the "basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare." *Local 174, Teamsters Union* v. *Lucas Flour Co., supra* at 105. See *In the Matter of Jacobson*, D. Mass., 1958, 161 F. Supp. 222, 227 (opinion by Wyzanski, *J.*), reversed and remanded *sub nom., Boston Mutual Life Ins. Co.* v. *Insurance Agents Union, supra. Cf. Procter & Gamble Independent Union* v. *Procter & Gamble Mfg. Co., supra* at 645.

It is for this reason that we cannot agree to the distinction propounded by Judge Palmieri in his very excellent discussion in *Carey* v. *General Electric Co.*, S. D. N. Y., 1962, 50 L. R. R. M. 2119, 45 CCH Lab. Cas. Par. 17,599, between matters of procedural compliance requiring the expertise of the arbitrator for decision and those which the courts are capable of deciding on their own. If the court must first decide whether a particular procedural problem calls for the special abilities and knowledge of an arbitrator, there will be inevitable delay. Such a practice, if followed, would develop a whole new body of decisional law, with the usual distinctions and refinements. Moreover, we have serious doubts that the suggested distinction between different types of procedural questions arising out of the arbitration clauses in collective bargaining agree- [fol. 126] ments can be placed upon any tenable and rational basis. In any event, it is clear that the practical consequences of attempts by the courts to apply such a distinction would be delay and prejudice to the speedy and effective arbitration which we believe the national policy calls for.

Having thus decided that the question of "procedural arbitrability" is for the arbitrator, we do not reach the merits of Wiley's contentions that the Union did not comply with the procedural requirements of the collective bargaining agreement.

Reversed with a direction to order arbitration.

APPENDIX

Article XVI: Grievances: Adjustments of Disputes: Arbitration.

Sec. 16.0. Any differences, grievance or dispute between the Employer and the Union arising out of or relating to this agreement, or its interpretation or application, or enforcement, shall be subject to the following procedures, which shall be resorted to as the sole means of obtaining adjustment of the difference, grievance, or dispute, hereinafter referred to as "grievance":

Step 1: The grievance, when it first arises, shall be the subject of a conference between the affected employee, a Union Steward and the Employer, officer or exempt supervisory person in charge of his department. The grievance shall be presented orally. If, at this step, the grievance is resolved to the mutual satisfaction of the parties, a memorandum stating the substance of the settlement shall be prepared and signed by the Employer representative and the affected employee. Copies of the same shall be furnished to the Union's Shop Steward and the Employer. In [fol. 127] the event that the grievance is not satisfactorily settled within two (2) working days after the conclusion of the conference stated above, the grievance shall be reduced to writing. It shall state the nature of the claim made and the objections raised thereto and shall be signed by the Employer representative and the affected employee.

Step 2: Within five (5) working days thereafter, the grievance shall be the subject of a conference between an officer of the Employer, or the Employer's representative designated for that purpose, the Union Shop Committee and/or a representative of the Union, at which conference the parties will endeavor to resolve and settle the grievance.

Step 3: In the event that the grievance shall not have been resolved or settled in "Step 2", the grievance shall be referred and submitted to arbitration before an impartial arbitrator who shall be chosen by the mutual consent in writing by the Employer and the Union. All grievances not satisfactorily adjusted within two (2) weeks from their inception shall be referred to arbitration, unless such time shall be extended in writing by Employer and the Union.

Sec. 16.1. In the event that the parties fail to agree upon an impartial arbitrator, as provided in "Step 3", the impartial arbitrator, by the filing of a demand for arbitration by the aggrieved party, shall be selected and designated by the American Arbitration Association, pursuant to whose Rules for its Voluntary Labor Arbitration Tribunal, any and all arbitrators shall be conducted.

Sec. 16.2. The arbitrator finally designated to serve in that capacity, after receiving a written statement signed jointly by the Employer and the Union certifying to his selection and designation as aforesaid and containing a concise statement of the issue involved, shall conduct the arbitration in accordance with the Arbitration Law of the [fol. 128] State of New York. The decision of the Arbitrator shall be final and binding upon the parties. All expenses incidental to the arbitrator's services, if any, shall be borne equally by the Employer and the Union.

Sec. 16.3. It is agreed that time is of the essence in any arbitration, and both parties will exert their best efforts to obtain a speedy decision.

Sec. 16.4. It is expressly agreed that there shall be no strike, slow-downs or suspension of work of any nature while a grievance is in the process of negotiation and disposition under the grievance and arbitration procedures of this Article.

Sec. 16.5. It is agreed that, in addition to other provisions elsewhere contained in this agreement which expressly deny arbitration to specific events, situations or contract provisions, the following matters shall not be subject to the arbitration provisions of this agreement:

(1) the amendment or modification of the terms and provisions of this agreement;

(2) salary or minimum wage rates as set forth herein;

(3) matters not covered by this agreement; and

(4) any dispute arising out of any question pertaining to the renewal or extension of this agreement.

Sec. 16.6. The status in effect prior to the assertion of a grievance or the existence of any controversy or dispute shall be maintained pending a settlement or decision thereof. Notice of any grievance must be filed with the Employer and with the Union Shop Steward within four (4) weeks after its occurrence or latest existence. The failure by either party to file the grievance within this [fol. 129] time limitation shall be construed and be deemed to be an abandonment of the grievance.

Sec. 16.7. Nothing contained in this Article shall be deemed to be a restriction or limitation of the rights of the Employer, or the Union, or an individual employee, or a group of employees, as specified in Section 9(a) of the Labor Management Relations Act, 1947, as amended. However, whenever any meetings or conferences are held with the Employer during business hours, the Union's employee-representatives shall be limited to only two (2) employees. During negotiations for the renewal of this agreement, the Union's negotiating committee shall be limited to no more than three (3) employees. Except in emergency situations, employees shall not discuss grievances with Stewards during regular working hours.

Sec. 16.8. Grievances or disputes arising out of this agreement shall not be combined or accumulated and submitted as a part of one case or arbitration proceeding. Accordingly, no arbitrator shall have the authority to hear or determine more than one (1) grievance, unless several grievances arise out of the same common state of facts, and are relevant and germane to one another. Whenever any provision in this agreement reserves to the Employer the right to exercise its sole discretion or judgment with

respect to specific subjects, events, matters or situations, the exercise or non-exercise of such discretion or judgment shall not be arbitrable.

Sec. 16.9. Except for threatened breaches or actual breaches of the provisions of Article "25" of this agreement ["Strikes and Lockouts"] the arbitration procedure herein set forth is the sole and exclusive remedy of the parties hereto and the employees covered hereby, for any claimed violations of this contract, and for any and all [fol. 130] acts or omissions claimed to have been committed by either party during the term of this agreement, and such arbitration procedure shall be (except to enforce, vacate, or modify awards) in lieu of any and all other remedies, forums at law, in equity or otherwise which will or may be available to either of the parties. The waiver of all other remedies and forums herein set forth shall apply to the parties hereto, and to all of the employees covered by this contract. No individual employee may initiate an arbitration proceeding.

KAUFMAN, Circuit Judge, concurring:

In view of the extraordinary complex problems raised in the case before us, all of which have been thoroughly and persuasively dealt with in the opinion of Judge Medina and so many of which will have broad ramifications in the growing and yet unshaped field of federal labor law, I deem it my responsibility to clarify what I interpret to be the holding of the court today. We hold that the collective bargaining agreement between Interscience and the Union does not clearly remove from the scope of arbitration the following questions: (1) Whether the collective bargaining agreement as a whole survived the consolidation of Interscience and Wiley; (2) If the agreement did survive the consolidation—thereby imposing upon Wiley an obligation to arbitrate at the behest of the Union disputes arising before its natural termination on January 31, 1962—whether the Union had to comport with the three-step grievance procedure, and if so, whether it did in fact comport with it or was relieved from doing so; and (3) Whether

certain Union and employee rights became "vested" under the terms of the agreement.

Although the collective bargaining agreement contains no express provision making its obligations binding upon [fol. 131] the successors of the parties, our decision today, in effect, permits the arbitrator to "imply" such a provision into the agreement if, under the circumstances present here such an implication is proper. In doing so, he will no doubt make an effort to extrapolate the probable intentions and expectations of the parties, to evaluate the change in the nature and scope of the employment unit and employer-employee relationships, the disruptive potential of implying such a clause, and other relevant factors. It is this power to read a successor clause into the collective agreement which makes Wiley a proper party defendant in the case before us. What we decide here is that since the arbitrator *may* find that the agreement was intended to bind successors, and that since Wiley is the successor of Interscience, then Wiley is a potential party to a binding arbitration decree. Our mere refusal to determine that Wiley is not a proper party defendant in this judicial proceeding does not preclude the arbitrator from determining that Wiley was not meant to be bound by the obligations in the collective agreement—either the obligation to arbitrate or the obligation to respect the allegedly "vested" rights of the employees. So too, the Union is a proper party plaintiff, even though the arbitrator may ultimately determine that, because the collective bargaining agreement was not intended to survive consolidation, the Union cannot compel arbitration.

With this interpretation of the court's holding in mind, I enthusiastically register my concurrence.

[fol. 132]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Harold Medina, Hon. J. Joseph Smith, Hon. Irving R. Kaufman, Circuit Judges.

DAVID LIVINGSTON, as President of District 65, R. W. D. S. U., AFL-CIO, Plaintiff-Appellant,

v.

JOHN WILEY & SONS, INC., Defendant-Appellee.

JUDGMENT—January 11, 1963

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the of said District Court be and it hereby is reversed with a direction to order arbitration in accordance with the opinion of this court; with costs to the appellant.

A. Daniel Fusaro, Clerk.

[fol. 133] [File endorsement omitted]

[fol. 134]

Petition for rehearing and for rehearing in banc covering 28 pages filed January 25, 1963, omitted from this print.

It was denied and nothing more by orders dated February 5, 1963.

[fol. 157]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING IN BANC—
February 5, 1963

Paskus, Gordon & Hyman, New York, N. Y., for defendant-appellee.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

J. Edward Lumbard, Chief Judge.

[fol. 158] [File endorsement omitted]

[fol. 159]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Charles E. Clark, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Hon. Irving R. Kaufman, Hon. Paul R. Hays, Hon. Thurgood Marshall, Circuit Judges.

[Title omitted]

ORDER DENYING PETITION FOR REHEARING IN BANC—
February 5, 1963

A petition for a rehearing in banc having been filed herein by counsel for the defendant-appellee,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 160] [File endorsement omitted]

[fol. 161]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Harold R. Medina, Hon. J. Joseph Smith, Hon. Irving R. Kaufman, Circuit Judges.

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—February 5, 1963

A petition for a rehearing having been filed herein by counsel for the defendant-appellee,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 162] [File endorsement omitted]

[fol. 163]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 27629—Cal. No. 217

In the Matter of DAVID LIVINGSTON, as President of District 65, Retail, Wholesale and Department Store Union, AFL-CIO, Plaintiff-Appellant,

v.

JOHN WILEY & SONS, INC., Defendant-Appellee.

APPLICATION TO STAY THE MANDATE PENDING CERTIORARI—Filed February 15, 1963

The defendant-appellee moves the Court to enter an order withholding the mandate in this case, pursuant to Rule 28(c) of this Court, on the grounds that it is the

intention of the defendant-appellee to make proper and timely application to the Supreme Court of the United States for a writ of certiorari in this case. In support of this application, the defendant-appellee attaches hereto the affidavit of Charles H. Lieb, Esq., attorney for the defendant-appellee.

Notice of Motion

Please Take Notice that the undersigned will bring the above motion on for a hearing before this Court at the United States Courthouse, Foley Square, New York, New York, on the 11 day of February, 1963, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Paskus, Gordon & Hyman, By Charles H. Lieb, A member of the firm, Attorneys for Defendant-Appellee, 733 Third Avenue, New York 17, New York.

[fol. 163a] To:

Weisman, Alan Spett and Sheinberg, Esqs., Attorneys for Plaintiff-Appellant, 1501 Broadway, New York 36, New York.

[fol. 164]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

AFFIDAVIT

State of New York,
County of New York, ss.:

Charles H. Lieb, having been duly sworn, deposes and says:

1. I am a member of the firm of Paskus, Gordon & Hyman, attorneys for the defendant-appellee herein, and I am familiar with all the proceedings had herein.

2. I hereby certify that it is the bona fide intention of the defendant-appellee to make proper application to the Supreme Court of the United States for a writ of certiorari in this case.

3. I believe that the judgment of this Court ought to be reversed by the United States Supreme Court.

4. This affidavit is made in support of the defendant-appellee's application to stay the mandate of this Court pending such application for certiorari, pursuant to Rule 28(c) of this Court.

Subscribed and sworn to this day of 1963.

Charles H. Lieb

[fol. 165] Motion granted subject to the provisions of Rule 28 of the Rules of this Court.

HRM, JJS, IRK, USCJJ.

February 15, 1963.

[File endorsement omitted]

[fol. 166]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Harold R. Medina, Hon. J. Joseph Smith, Hon. Irving R. Kaufman, Circuit Judges.

[Title omitted]

ORDER GRANTING MOTION TO STAY ISSUANCE OF MANDATE UNDER RULE 28(c)—February 15, 1963

A motion having been made herein by counsel for the appellee to stay the issuance of the mandate pending application for a writ of certiorari to the Supreme Court of the United States,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted in accordance with the provision of Rule 28(c) of the rules of this court.

A. Daniel Fusaro, Clerk.

[fol. 167] [File endorsement omitted]

[fol. 168] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 169]

SUPREME COURT OF THE UNITED STATES

No. 934—October Term, 1962

JOHN WILEY & SONS, INC., Petitioner,

vs.

DAVID LIVINGSTON, ETC.

ORDER ALLOWING CERTIORARI—Filed May 13, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Goldberg took no part in the consideration or decision of this petition.